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WISCONSIN REPORTS

102

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

JANUARY 31 — APRIL 25, 1899.

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
CHARLES V. BARDEEN,
JOSHUA ERIC DODGE.

Attorney General, - EMMETT R. HICKS.

Clerk, - - - CLARENCE KELLOGG.

ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 101.

Mr. Justice BARDEEN took no part in the decision of the case of *National Bank of Merrill v. Ill. & Wis. Lumber Co.* (p. 247).

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CASES DETERMINED

AT THE

January Term, 1899.

ESTATE OF COLE: MULBERGER, Respondent, vs. BEURHAUS and others, Executors, Appellants.

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January 11—January 31, 1899.

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(1-3) *Municipal corporations: Refusal of officers to enforce rights: Action by taxpayer: Appeal from county court.* (4-6) *Trusts and trustees: Repairs and permanent improvements on realty: Payment from income: Costs.*

1. When the officers of a public corporation, upon whom the duty devolves of appealing to the courts to protect its rights, refuse to put the necessary judicial machinery in motion upon demand being made therefor by a taxpaying member of such corporation acting for himself and all other such persons, or the circumstances are such as to obviously render such demand useless, such taxpayer may, so acting, take the place of such public officers for the purpose of enforcing the corporate rights.
2. If a public corporation be aggrieved by a determination of a county court as to a matter pending before it, and the proper officers of such corporation refuse or neglect to appeal from such determination to the circuit court for relief, a taxpaying member of such corporation, acting as before indicated, may intervene and take the appeal.
3. The test of the right of appeal in the circumstances stated above is not whether the taxpayer is directly injured by the determination of the county court, but whether the corporation as a whole is injured or aggrieved in a matter in which the individual members of the corporation have a substantial interest.
4. If property consisting of real estate be by will conveyed to trustees to hold for the life of certain persons in being therein named, the

income therefrom to be used so far as necessary to keep the property in repair and to pay the taxes and insurance, and the balance to be paid to those having the life interest during the continuation of their lives, and the corpus of the property to be, at the termination of the life interest, conveyed to a municipal corporation for purposes for which it may legally hold and devote it, and there be ample income from such property to preserve it for the ultimate purpose named in the will, and there be no express power in the will for the trustees to make permanent repairs or improvements on the property out of the corpus thereof, only the income can be devoted to that purpose.

5. In the circumstances mentioned in the foregoing, the trustees of the trust, even with the consent of those having the life interest and the municipality entitled to the property ultimately, have no right to devote any part of the principal of the trust estate to the making of betterments or permanent improvements.

6. In an action to enforce a trust, or concerning its administration, the subject of costs is regulated wholly by statute. All costs and counsel fees as well, for which the trustees would otherwise be liable, are chargeable to the trust property or income thereof, in the absence of some direction to the contrary based on bad faith on the part of the trustees. The court has no authority, independent of a statute on the subject, to direct the payment of costs or counsel fees out of the trust fund, except such taxable costs as the trustees would otherwise be compelled to pay personally.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Jefferson county: JOHN R. BENNETT, Circuit Judge. *Affirmed.*

John W. Cole died testate February 17, 1894. By his will he bequeathed to three executors named the bulk of his property in trust, to manage and control the same during the life of his wife, Eliza Cole, and son, *Oscar A. Cole*, to keep all the buildings insured and in a proper state of repair, to collect all rents and other revenues of the estate, to disburse the same by paying for all repairs, insurance, taxes, and expenses of administering the trust, and by paying the residue to the wife and son in certain proportions indicated during the lifetime of both, and the whole to the survivor during his or her life; and at the death of the wife and son

the entire trust estate received by the trustees under the will was directed to be conveyed to the city of Watertown in trust for the establishment and maintenance of a public library and business men's club room, and a home for aged and poor people of the city. One of the executors named refused to serve, and one died in the lifetime of the testator. Such proceedings were had that the defendants were duly appointed as trustees and executors, and prior to October 28, 1897, they duly completed the settlement of the estate as to the usual probate proceedings.

Before the testator died he commenced making some repairs and changes of some business buildings covered by the bequests, which repairs were continued to completion, and other repairs and changes in the property bequeathed were made by the trustees, which, in effect, modernized two of such buildings by putting in new fronts and otherwise making them more desirable as rentable property. A barn was also reconstructed, and some expenditures were made on a farm by way of making a well and erecting a windmill. On the 10th day of June, 1897, a detailed statement of receipts and disbursements made on account of the property was filed, whereby it appeared that several thousand dollars of income had been received in excess of the amount paid out for repairs and improvements. All such repairs and improvements were charged against the income, and also $2,164.97 paid to the wife and son, and there was yet left in the hands of the trustees a balance of $1,084.48. Subsequent to the filing of such statement the trustees represented to the common council of the city of Watertown that they were entitled to be reimbursed out of the estate for expenditures charged against the income for improvements on the property and other expenditures. The result was that an agreement was made between such trustees and the city council, to the effect that a portion of the trust estate known as the homestead should be sold, and the proceeds used to reimburse the for-

mer for money paid out by them for funeral expenses, debts and taxes due at the death of the testator, and for permanent improvements made, or that might be made, on the property. Such proceedings were thereafter had that the homestead was sold under an order of the county court, the proceeds to be applied according to the subsequent order of the court.

Thereafter on the 28th day of October, 1897, defendants made a final report as executors, of the expenses incurred in the settlement of the estate, showing a balance of $1,791.21 due them. They also filed a detailed statement of what they called "permanent improvements" on the real estate, as follows: On the Cole Block, $1,225.99; on the homestead, $146.58; on the Harvey Block, $2,184.98; on the barn, $316.02; on the farm, $205.50,—the same being identical with the expenditures paid out of the income according to the statements filed in June. They also filed a statement of expenses of the sale of the homestead, amounting to $35, the entire account aggregating $4,114.07. Against that they credited the receipts from the sale of the homestead, leaving a balance due them of $114.07. A hearing was had on the accounts as so made up, at which a citizen and taxpayer of the city, the respondent herein, on behalf of himself and all others similarly interested, filed objections upon the ground that no authority existed for the making of permanent improvements on the trust property, and that none of the items in either of the accounts were for such improvements, and that no part of the proceeds of the homestead could properly be applied in payment of either the executors' account for the settlement of the estate, or for the so-called improvements upon the property. A hearing was had on such objections with the result that the court, by order, determined that the account for the amount due the executors, of $1,791.21, was payable out of the property of the testator not disposed of by his will; that no part of the proceeds of the homestead could be used to reimburse the executors

for expenditures upon the trust property in excess of such as constituted permanent improvements strictly so called; that it was impossible to determine the amount expended for such improvements with exactness, but that there should be allowed on that account the $316.02 paid out on the barn, $940.32 on the two business blocks, and $35 for expenses of making the sale of the homestead, in all $1,291.34.

The objecting taxpayer, respondent herein, in the capacity in which he filed his objections, appealed from the determination of the county court to the circuit court. In the circuit court the trustees moved for a dismissal of the appeal upon the ground that the appellant had no appealable interest. The motion was denied.

The result of the hearing on appeal was a judgment that the agreement between the city of Watertown and the defendants for a sale of the homestead and reimbursement of the trustees out of the proceeds for money laid out and expended by them on the trust property, was void, and that the whole of such proceeds, $4,000, belonged to the trust estate to be invested for the benefit of Mrs. Cole and her son *Oscar* during their lives, and thereafter to be paid over to the city of Watertown in trust for the purposes mentioned in the will of John W. Cole. From that judgment defendants appealed.

L. B. Caswell and *W. H. Rogers*, for the appellants, contended, *inter alia*, that the circuit court should have dismissed the appeal for the reason that *Mulberger*, the appellant from the county court, had no interest in the subject matter determined and was not a party aggrieved. R. S. 1878, sec. 4031; *Amory v. Amory*, 26 Wis. 152; *Strong v. Winslow*, 3 Pin. 27; *Gunn v. Green*, 14 Wis. 316; *Downer v. Howard*, 47 id. 476; *Marx v. Rowlands*, 59 id. 110; *Estate of Cook*, 99 Mich. 63. To enable a party to appeal he must have an absolute pecuniary interest in the matter in controversy. *McFarland v. Pierce*, 151 Ind. 546; *Labar v. Nichols*, 23 Mich.

310; *Estate of Cook*, 99 id. 63; *Briard v. Goodale*, 86 Me. 100; *Deering v. Adams*, 34 id. 41; *In re Estate of Hardy*, 35 Minn. 193; *Swan v. Picquet*, 3 Pick. 443; *Richardson v. Richardson*, 2 Root, 219; *Kelly v. Israel*, 11 Paige, 147; *State ex rel. Agusti v. Houston*, 30 La. Ann. 1175; *State ex rel. Belden v. Markey*, 21 id. 743; *Raleigh v. Rogers*, 25 N. J. Eq. 506; *Swackhamer v. Kline's Adm'r*, id. 503. The testator attempted to make the city a trustee for certain charitable purposes, and a mere taxpayer in the city cannot have any pecuniary interest in the trust, or be an aggrieved person within the meaning of the statute. Unless *Mulberger* can show he has a special pecuniary interest or would sustain loss resulting from the order of the county court, not in common with the others, he has no standing in court and cannot appeal from the order. *Bell v. Platteville*, 71 Wis. 147; *Gilkey v. Merrill*, 67 id. 459; 2 Dillon, Mun. Corp. § 574; *Burbank v. Burbank*, 152 Mass. 254. See, also, 1 Am. & Eng. Ency. of Law, 450; *Downer v. Howard*, 47 Wis. 476; *Judd v. Fox Lake*, 28 id. 583; *Doolittle v. Broome Co.* 18 N. Y. 155; *Hale v. Cushman*, 6 Met. 425. The donation is not to the city of Watertown so as to affect taxation. It is to the city in trust for certain objects. *McHugh v. McCole*, 97 Wis. 166, 182; *Rhymer's Appeal*, 93 Pa. St. 142–145. The right of a taxpayer to appear in court against a common injury is similar to a proceeding to abate a common nuisance. It must appear that the plaintiff sustains damage peculiar to himself and not in common with his fellows. Otherwise the action must be prosecuted by the attorney general. *Bigelow v. Hartford B. Co.* 14 Conn. 565, 577; *Zettel v. West Bend*, 79 Wis. 316; *Kuehn v. Milwaukee*, 83 id. 583.

Harlow Pease, for the respondent.

MARSHALL, J. Appellants contend that respondent had no right to take the appeal from the county court to the circuit court, and that the latter erred in not dismissing it on

appellants' motion. The statute (sec. 4031, R. S. 1878) is referred to, giving the right of appeal in such cases only to the party aggrieved, and numerous cases are cited to the effect that only a person having a substantial or pecuniary interest in the matter is a party aggrieved within the meaning of the statute. It is unnecessary to discuss that question at any considerable length. It is sufficient to refer to the reasoning in many cases recently decided by this court as to the right of a taxpayer to enforce the cause of action of a public corporation of which he is a member when its officers neglect or refuse to perform their duty. *Quaw v. Paff*, 98 Wis. 586; *Frederick v. Douglas Co.* 96 Wis. 411; *Land, L. & L. Co. v. McIntyre*, 100 Wis. 245, 258; *Rice v. Milwaukee*, 100 Wis. 516; *Webster v. Douglas Co. post*, p. 181.

The direct injury to be remedied where the taxpayer intervenes and sets the judicial machinery in motion for that purpose, is not personal and direct to himself, but to the corporation. The question is, Are the members of the corporation as a whole aggrieved? If so, rather than that justice shall fail, the court will take jurisdiction of the subject of controversy at the instance of a taxpayer. The fact that the threatened injury or the wrong done is to the corporation, and that its governing body or officers, who should move in the matter, neglect or refuse to do so, creates a necessity for some other way to remedy the mischief, and in that situation the circumstance of a person being a taxpayer and interested in the protection of its rights is a sufficient test of his competency to challenge the threatened wrong, or wrong actually done, in a court of justice. That jurisdiction of the court is the most powerful and effective force to prevent and redress wrongs to public corporations when their officers squander public money or improperly surrender or violate public rights, either corruptly or ignorantly. There is no other way to successfully and efficiently meet that situation. In such cases, where officers neglect to do

their duty, the wrong need not by any means go unredressed so long as there is a single taxpayer with courage and public spirit enough to set the judicial machinery in motion. He may stand in court in place of the unfaithful public officials. The court, in him, will recognize the interests of the corporation as a whole, and, with the evidence produced before it calling for action, by its decree compel the performance of duty by all within its reach.

No man or set of men can wrong a public corporation in Wisconsin and defy its members, by means of sustaining such relations with the individuals of its governing body as to deter them from properly protecting the public rights, or their failing to do it from any other cause. Such has been found to be the situation in some states at some times, as indicated in *Land, L. & L. Co. v. McIntyre, supra*, but not here. The subject is not governed by any statute, or necessarily by precedent. As said in the case cited, the power of a court of equity, which is the jurisdiction invoked by the taxpayer, is broad enough to fit all situations where, to effect justice, a remedy is required. While it is guided by precedents, it is not governed by them, but may meet new situations as they arise, so that, in the race between it and wrong doing by public servants in the handling of the financial affairs of the municipality, the way is open and the means ample to secure the prevalence of justice over wrong.

It will not be questioned but that the city of Watertown could have appealed from the action of the county court. That being the case, the taxpayer, within all the decisions of this court, had a sufficient interest in maintaining the corporate rights to enable him to intervene and take the appeal when the corporation would not proceed in the proper way to protect its rights.

The remaining question to be determined is, Did the trial court rightly decide that the entire expenditures made by the trustees upon the trust property were chargeable to the

income therefrom? That must be answered in the affirmative, and independently of whether the decision was strictly right as to the expenditures being all for repairs strictly so called or not. As to that, however, we see no reason for disturbing the decision of the trial court. The will clearly indicates that the entire estate received from the testator was intended by him ultimately to be conveyed to the city of Watertown for the purposes indicated therein. It devoted the income to the payment of all repairs on the buildings, and said that all of the property which came to the possession of the trustees shall at the end be conveyed to the city. There is no special power given to do anything to the buildings except to keep them in repair. As a general rule, unless such special power be expressly given to trustees, they cannot exercise it at all. Perry, Trusts, § 526; Lewin, Trusts, *576; Beach, Trusts, § 626, and cases cited to text in each. Beach states the rule thus: "Subject to certain modifications it is the rule that where real estate is conveyed to trustees in trust for a tenant for life, with remainder over, the trustees have no power to raise money out of the *corpus* of the estate for the purpose of making substantial and permanent repairs, either on the buildings or on the land. Such expenses, if incurred, will be a charge on the interest of the tenant for life." *Nairn v. Marjoribanks*, 3 Russ. 582, is instanced to support the text, where Lord ELDON said that, even if the master should report that it would be for the benefit of all parties interested that improvements should be made, he would not confirm the report.

Some exceptions to the extreme rule stated are found in some modern decisions, in cases where the control of the property given to the trustees was of such a nature as to include by implication power to incur expenses for permanent improvements, or where it was necessary to make such improvements in order to preserve the property and make it tenantable, and there was no other way of raising the nec-

essary money to do it; but no case can be found sanctioning improvements to property at the expense of the remainderman where power to do so is not given by the instrument creating the trust, either expressly or impliedly, or where the income from the property is ample to meet all such expenditures. In *Peirce v. Burroughs*, 58 N. H. 302, the general rule is stated thus: "The preservation of the capital without expense to the remainderman is as much his right, as the use of the property without payment of rent is the right of the tenant for life; the measure of the latter is the net income for life." *Cogswell v. Cogswell*, 2 Edw. Ch. 231, is a further good illustration of the rigorous adherence to that rule by courts of equity. There a portion of the trust property consisted of buildings in such a condition as to yield but very little income, and the court said that did not justify the making of permanent improvements at the expense of the trust property, the testator having given no directions in that regard in his will. That applies very clearly to the will before us. The testator indicated clearly, as before stated, that the buildings on the property were to be put in repair, and kept in repair, out of the income till the expiration of the life interest of the wife and son, and then that the property, unimpaired as it came to the trustees, except as to character of investments changed under the terms of the will not material to this discussion, should be conveyed to the city of Watertown. There is no power in the trustees to change the plain scheme of the will, no power in the court to authorize any such change, and no power in the city of Watertown to vary it in any manner. As the testator's scheme was worked out and inscribed in the will, so must it be. The trustees must carry out that to the letter, and at the end the city of Watertown must take the estate for the purposes indicated in the will, or reject it.

It follows, as the learned trial court decided, that the agreement made by the council of the city of Watertown for the

reimbursement of the trustees out of the trust estate for expenditures made by them upon the property, was *ultra vires* and totally so, and, as said before, without regard to whether such expenditures were in part for permanent improvements, strictly so called, though we are inclined to say, as did the trial court, that they were all repairs within the language of the will expressly directing the application of the income of the property, so far as necessary, to the payment of all expenditures necessary to keep such buildings in a proper state of repair. That certainly includes all reasonable charges necessary to make the structures desirable as rentable property.

There is no other question that requires consideration. Some suggestion was made on the argument as to the right of the parties to have costs and counsel fees out of the estate, and as to directions for the court below to make a proper allowance for such counsel fees. It is considered that the subject of taxable costs, strictly so called, in a case like this, is wholly regulated by statute. The court below has discretionary power to allow or withhold costs as justice seems to require. If allowed against the trustees they are payable out of the trust fund unless the court otherwise directs because of bad faith on the part of such trustees. R. S. 1878, sec. 2932. That applies to all courts and to the reasonable counsel fees of the trustees as well as taxable costs, the latter meaning costs taxed according to the statutory fee bill. In this connection, as to the appeal to this court, we are unable to say that the appellant trustees have been guilty of such bad faith as should subject them, personally, to the expenses of such appeal. Their costs and expenses here, therefore, will be paid from the trust fund, but from that part represented by the income. Whether their expenses, including counsel fees of the litigation below, shall be likewise paid, is a matter that will be left to the court that shall further superintend the administration of the trust.

In regard to granting counsel fees to the respondent, or giving directions to the lower court to do so, payable out of the trust fund, that is quite another question. There is no statute authorizing such a proceeding and no precedent for it in this court. The counsel fees of trustees, acting in good faith, and costs taxed against them as well, were always payable out of the trust fund, because of the injustice of making them bear the expense, personally, of matters done honestly, in a representative capacity. But it is considered that counsel fees to others that may be interested in the trust fund are not recoverable, either from the trustees personally or out of such fund. That was the rule in chancery before the Code, and there is no statute changing it, nor any precedent varying the old practice. *Rose v. Rose B. Asso.* 28 N. Y. 184; *Downing v. Marshall,* 37 N. Y. 380; *Devin v. Patchin,* 26 N. Y. 441; *Lee v. Lee,* 39 Barb. 172; Parsons, Costs, 132. There are cases in this court for the construction of wills, and contests as to the validity of wills, where a different rule has been adopted, which we need not review here. It does not apply to this case.

An examination of respondent's brief satisfies us that there is much unnecessary matter in it. Costs for that we limit to $35.

By the Court.—The judgment of the circuit court is affirmed, costs to be taxed and paid as indicated.

BARDEEN, J., took no part.

HOBKIRK, Appellant, vs. THE PHŒNIX INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Respondent.

102 13
109 376
102 13
60 LRA 920
102 13
117 535

January 11—January 31, 1899.

Fire insurance: Waiver of condition as to incumbrances: Reformation.

1. Prior to the enactment of ch. 387, Laws of 1895, the issuance of an insurance policy by an agent with full knowledge of the existence of an incumbrance on the property was a waiver of a condition in the policy against incumbrances, even though the policy provided that such waivers must be in writing.
2. Where such a condition has been so waived a recovery may be had on the policy without its being reformed to express the consent of the company to the incumbrance.

APPEAL from a judgment of the circuit court for Dodge county: WARHAM PARKS, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *James J. Dick*, and for the respondent on that of *C. E. Hooker*, of counsel.

CASSODAY, C. J. The following facts appear from the record, and are, in effect, found by the court: During the past four years the plaintiff has been engaged in the mercantile business in Waupun. The defendant was a corporation organized under the laws of Connecticut, and R. L. Oliver was, during that time, its agent. During that time it was understood and agreed, by and between the plaintiff and the defendant, through its said agent, that when the plaintiff's insurance policy in the defendant, on his stock, furniture, and fixtures, should expire another should be issued, extending the one then expiring, and that the defendant should keep the plaintiff constantly insured against damage by fire to his stock, furniture, and fixtures in the sum of $2,000. December 1, 1893, the defendant, in accordance with such agreement, issued and delivered to the plaintiff its policy of insurance in the sum of $2,000 against

damage by fire for the term of one year from that date,—$1,800 on his stock, and $200 on his furniture and fixtures. June 5, 1894, the plaintiff gave a chattel mortgage to his father, Robert Hobkirk, Sr., on his stock of goods, furniture, and fixtures, to secure an indebtedness then owing by him to his father and others, amounting to some $1,800, and the same was filed June 12, 1894. June 5, 1894, the defendant, through its agent, R. L. Oliver, was informed of the execution of the chattel mortgage, and was then and there requested, and then and there agreed, to make an indorsement, in writing, on the policy, permitting the property thereunder insured to be incumbered by a chattel mortgage, and making the loss, if any, thereunder payable to Robert Hobkirk, Sr., as his interest might appear. Thereupon the defendant commenced to make the indorsement so requested and so promised on the policy, but, being misled, indorsed thereon instead the consent of the defendant to the assignment of the policy to Robert Hobkirk, Sr., and then informed the plaintiff that he had made the indorsement requested and promised.

On December 19, 1894, the defendant, through its agent, in accordance with such understanding and agreement to keep the property insured, without any other or further request therefor, and with full knowledge of the existence of the chattel mortgage, and for the purpose of extending the policy, executed and delivered to the plaintiff its policy of insurance, wherein and whereby the defendant insured the plaintiff for the term of one year from December 19, 1894, in the sum of $2,000,—$1,800 on his stock of merchandise, and $200 on his furniture and fixtures,—and which policy was the regular standard fire insurance policy of the state of Wisconsin. Upon the delivery to the plaintiff of that policy, the plaintiff demanded of the defendant that an indorsement thereon, in writing, as so requested be made. Thereupon the defendant agreed with the plaintiff that such

provision in reference to the chattel mortgage should be a part of the contract of insurance and policy, but it neglected to make such indorsement, and informed the plaintiff that such policy so issued was a good and valid policy. The plaintiff had performed all the conditions of such contract of insurance by him to be performed, and violated no condition thereof.

On March 12, 1895, a fire occurred, whereby the stock so insured, valued at $5,000, was damaged by fire and smoke to the amount of $700, and the furniture and fixtures were damaged by fire and smoke to the amount of $100. The plaintiff gave the defendant immediate notice of the loss. March 15, 1895, the defendant inspected the loss, and duly waived all further notice of the loss. March 27, 1895, the defendant, with full knowledge of the existence of the chattel mortgage and the terms and conditions of the policy, agreed and promised to pay the plaintiff for the amount of the loss so sustained as claimed by the defendant, and continued to recognize the policy as good and valid. Afterwards the defendant denied all liability under the policy, and refused to pay the loss, or any part thereof, and thereby waived the further proofs of loss. There was due to the plaintiff from the defendant, by reason of such loss, the sum of $800, with interest from March 27, 1895. It was provided in and by the policy that, if the subject of insurance should be personal property, as in this case, and the same should become incumbered by a chattel mortgage, then the entire policy should be void, unless otherwise provided by agreement indorsed on the policy or added thereto.

And, as conclusions of law, the court found, in effect, that the plaintiff was entitled to have judgment reforming the policy according to the facts found, and that the plaintiff have judgment in his favor against the defendant for $800, and interest from March 27, 1895, and for the costs and disbursements of this action. From the judgment entered thereon accordingly the defendant brings this appeal.

It is not only found by the court, but is virtually admitted, that at the time the policy was issued, in December, 1894, the defendant's local agent, issuing the same, had full knowledge of the existence of the chattel mortgage. As the law stood prior to the standard policy, there can be no question but that the issuing of the policy by such agent, with such knowledge, was a waiver of the condition in the policy against incumbrances. *Renier v. Dwelling House Ins. Co.* 74 Wis. 94, and cases there cited; *Bourgeois v. Mut. F. Ins. Co.* 86 Wis. 402; *Seibel v. N. W. Mut. R. Asso.* 94 Wis. 257; *De Witt v. Home Forum Benefit Order*, 95 Wis. 305. Ch. 195, Laws of 1891, was enacted for the purpose of prescribing a written form of policy which would prevent any waiver of any conditions therein, except as therein prescribed. On the assumption that that act was valid, this court held, in effect, that the conditions and provisions of such standard policy were binding, and could not be changed nor waived, except in the manner indicated. *Bourgeois v. N. W. Nat. Ins. Co.* 86 Wis. 606. The same rule has recently been applied to the present "Wisconsin Standard Fire Insurance Policy" (ch. 387, Laws of 1895, being sec. 1941—43 to 1941—65, Stats. 1898). *Straker v. Phenix Ins. Co.* 101 Wis. 413. But after the decision in *Bourgeois v. N. W. Nat. Ins. Co.* 86 Wis. 606, it was discovered that ch. 195, Laws of 1891, did not prescribe a legal form of policy, but was a mere attempt on the part of the legislature to delegate to the insurance commissioner legislative power to prescribe such form of policy, and was therefore unconstitutional and void. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63. And so, notwithstanding the provisions of ch. 195, Laws of 1891, it was held in that case that "issuance of a policy after the insured had fully informed the agent as to existing incumbrances on the property was a waiver of a condition in the policy that it should be void if the property was incumbered, notwithstanding a provision that there should be no waiver of any of the conditions of the policy unless such waiver

was written upon or attached thereto." To the same effect, *Dick v. Equitable F. & M. Ins. Co.* 92 Wis. 46; *Goss v. Agricultural Ins. Co.* 92 Wis. 233; *McDonald v. Fire Asso.* 93 Wis. 348; *Flatley v. Phenix Ins. Co.* 95 Wis. 618.

In the case at bar, the insurance policy upon which the action was brought was issued December 19, 1894, and the fire and loss occurred March 12, 1895. Ch. 387, Laws of 1895, prescribing the form of the "Wisconsin Standard Fire Insurance Policy," did not go into effect until May 1, 1895; and hence the case at bar is not within nor subject to that enactment. It follows that the issuing of the policy by the defendant's agent, with full knowledge of the existence of the chattel mortgage, was a waiver of the condition in the policy against incumbrances, mentioned. Under the authorities cited, the reformation of the policy was entirely unnecessary.

By the Court.—The judgment of the circuit court is affirmed.

BARDEEN, J., took no part.

ZIEGLER, Respondent, vs. CITY OF WEST BEND, Appellant.

102	17
115	543
115	545
115	546

January 12—January 31, 1899.

Municipal corporations: Defective streets: Notice of injury.

The failure of a city, in constructing a street, to make it reasonably safe for public travel—in this case the improper adjustment of the cover of a manhole over a catch-basin by reason of which such cover slid out of place when stepped on—is not the creation of a nuisance rendering the city liable at common law for injuries caused thereby, but is a failure of duty rendering the city liable under sec. 1339, Stats. 1898, to persons injured by the insufficiency; and the giving of notice as required by that section is a condition precedent to the maintenance of an action.

APPEAL from an order of the circuit court for Washington county: JAMES J. DICK, Circuit Judge. *Reversed.*

Action for personal injuries. The complaint, by appropriate allegations, states that plaintiff was injured without fault on his part, by falling into the manhole of a catch-basin located in one of the streets of the defendant city; that the cover of the manhole was so improperly adjusted that travel over it by persons, either in vehicles or otherwise, was liable to displace it with injurious consequences to such persons; that plaintiff was injured in that way; that while traveling over the manhole he stepped upon the cover, causing it to slide out of its bed and let him drop into the manhole, thereby seriously injuring him. The complaint contained no allegation of notice to the city of the injury, with time and place of its occurrence and a description of the insufficiency or want of repair of the street causing it, except of a notice served some two months after the injury. The defendant demurred to the complaint for want of facts stated therein sufficient to constitute a cause of action. The demurrer was overruled, and defendant appealed.

For the appellant there was a brief by *P. O'Meara* and *H. K. Butterfield*, and oral argument by *P. O'Meara.*

For the respondent there was a brief by *Barney & Kuechenmeister*, and oral argument by *G. A. Kuechenmeister.* They argued, *inter alia*, that the cause of the injury was a nuisance, and no notice was necessary to make the city liable. *Hughes v. Fond du Lac*, 73 Wis. 380–382; *Little v. Madison*, 42 Wis. 643; *Harper v. Milwaukee*, 30 Wis. 365; *King v. Oshkosh*, 75 Wis. 519; *Steltz v. Wausau*, 88 Wis. 618; *Stephani v. Manitowoc*, 89 Wis. 467.

MARSHALL, J. This is an action to recover damages for injuries alleged to have been sustained by the plaintiff because of failure by the defendant city to perform its statutory duty of making the city street, where the injury

occurred, reasonably safe for public travel. There is no common-law liability in such a case, and none under the statute except upon compliance with all the conditions prescribed therein. This court has often said that, the right being statutory, it is competent to attach such conditions to it as in legislative wisdom may be deemed proper. However burdensome such conditions may be, the claimant for compensation for injuries has no good reason to complain, for without the statute he would be entirely remediless. In *Daniels v. Racine*, 98 Wis. 649, the subject will be found fully discussed.

Sec. 1339, Stats. 1898, provides that no action shall be maintained to recover damages caused by the insufficiency or want of repair of a street in any city, unless, within fifteen days after the occurrence of the event causing the injury, a notice in writing, signed by the party, his agent or attorney, shall be given to the mayor or city clerk of the city against which the damages are claimed, stating the place where and time when the injury occurred, and describing generally the insufficiency or want of repair which occasioned it, and that satisfaction therefor is claimed of such city. The complaint in this action shows that notice of plaintiff's claim was not given to the city till long after the expiration of the statutory period, hence it fails to state a cause of action. The point involved has often been discussed by this court, and very recently in *Daniels v. Racine*, *supra*.

Counsel for respondent contend that the statutory requirement for a notice referred to does not apply to injuries caused by defects in the original construction of a street, and cite cases in this court where it has been held that a municipality is responsible the same as a private individual for an improper obstruction placed in a street, constituting a nuisance. *Hughes v. Fond du Lac*, 73 Wis. 380, is referred to, where a roller was left in the street; also *Little v. Madi-*

son, 42 Wis. 643, where the city licensed a street exhibition of wild animals. That rule applies only to the doing of something which the city has no right to do, rendering a street or highway dangerous for public travel, not a failure to do properly what a city has a right to do. It may lay out and open a street for public travel and place in the street those things which legitimately belong there, such as crosswalks, sewers, and catch-basins with manholes. The failure to render the street as so constructed reasonably safe for public travel is not the creation of a nuisance, but a failure of duty, rendering the city liable to persons injured by the insufficiency, under sec. 1339 of the statutes. The act of a municipality resulting in the creation of a nuisance, and the failure to make a street reasonably fit for public travel or to keep it in a proper state of repair after the original construction, are sufficiently distinct that no great difficulty, it would seem, need be experienced in distinguishing when a claim for damages falls under sec. 1339 and when not. In the one case the street is obstructed or made unsafe by some act of the municipality of commission or omission, not connected with its construction or repair; in the other the insufficiency grows out of the unsafe construction of the street or the insufficient repair of it.

Stephani v. Manitowoc, 89 Wis. 467, is confidently referred to by respondent. Possibly the learned trial court was misled as to what is there decided. The defect complained of related to the original preparation of the street for public travel in that it was alleged there were no proper safeguards provided to prevent people from walking into an open drawbridge. The court said, previous notice of the defect was not requisite to charge the city with damages to a person injured thereby. That remark was not made with reference to notice of the injury under sec. 1339, but notice of the existence of the defect itself prior to the injury. It was the statement of a familiar principle of law that, while no-

tice, actual or constructive, of want of repair of a street, must be brought home to a public corporation in order to charge it with damages for an injury caused thereby, no such notice is required where the defect is in the original construction. In the latter case, knowledge on the part of the city is conclusively presumed. *Boltz v. Sullivan*, 101 Wis. 608. Notice of the injury, with the time and place of it, with a description of the insufficiency or want of repair of a street, comes after the injury occurs, and to enable the officers of the municipality to investigate the occurrence while it is fresh. Notice of the defect in a street, charging the municipality with actionable negligence, when required at all, comes before the injury a sufficient length of time to enable the proper officers, by the exercise of reasonable diligence, to remedy the insufficiency. It must appear clearly, without further discussion of the matter, that the learned circuit judge and counsel for respondent misapprehended *Stephani v. Manitowoc.* It has no application to this case whatever.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to sustain the demurrer to the complaint.

BARDEEN, J., took no part.

THE PLANO MANUFACTURING COMPANY, Respondent, vs. BERGMANN, Appellant.

January 12—January 31, 1899.

Fraud: Confidential relations: Burden of proof: Sale of chattels: Special verdict: Instructions to jury: Evidence: Immaterial errors.

1. Proof that the agent with whom the defendant contracted for the purchase of a harvester was a man with whom the defendant had traded for years and in whose integrity and business standing

he had confidence, is not sufficient to raise a presumption of a confidential relation, which would shift the burden of proof as to fraud in the transaction from the defendant to the plaintiff.

2. Instructions to the effect that a party who procures the execution by another of a contract by fraud and misrepresentation cannot then bar a defense thereto, on the ground that the other party has been ignorant or negligent, are *held* to have been properly refused as inapplicable to any of the questions submitted for a special verdict, although they might have been proper and applicable had there been a general verdict; and they were rendered wholly immaterial by a finding of the jury that the contract in suit was not so procured.

3. A finding in a special verdict that the agent of the vendor of a binder agreed that if on trial it did not suit the vendee he might return it without notice, is not inconsistent with a finding that the agent did not mislead the vendee as to the contents of a written order signed by the latter, by the terms of which written notice and an opportunity to remedy defects were to be given before the binder could be returned.

4. An error in not permitting a witness to be fully cross-examined is cured by permitting an exhaustive cross-examination on the same subjects when he reappeared in rebuttal.

5. In an action upon a written contract for the sale of a binder the court properly sustained an objection to a question, asked of the purchaser, as to what the bargain was; and such ruling was not a refusal to permit the purchaser to testify as to representations made to him by the vendor's agent before and at the time the contract was signed.

APPEAL from a judgment of the county court of Dodge county: C. A. CHRISTIANSEN, Judge. *Affirmed.*

The defendant signed a written order for a harvester, containing a warranty of material and workmanship, and providing that, if the machine did not work well, he should give written notice to the plaintiff, at Chicago, stating wherein it failed, and allow reasonable time to remedy the alleged defect, and that, if the machine could not be made to do the work, it should be returned to the agent and a new machine given in its place, or, in the option of the seller, purchase price refunded. The machine was not sat-

isfactory to the defendant, but he gave no written notice, though he did inform the agent at Hustisford, who made an effort to operate the machine (as to the success of which the evidence is conflicting), whereupon the defendant returned the machine to the agent, and refused to pay for it. Claim was made by the defendant that he was misled as to the terms of the written agreement, which, being in English, he was unable to read. The jury, by special verdict, found that the agreement was read and fairly explained to him by the agent, and that the purchase was not induced by any misrepresentation of the agent; that the machine satisfied the warranty; that the defendant failed to comply with the terms thereof, in not giving written notice as there required and not allowing the seller reasonable time to get to the machine and remedy its defects; and that he did not give the machine a fair trial. They also found, in answer to the fifth question, that the defendant and plaintiff's agent agreed that, if the binder on trial did not suit the defendant, he might return it without further notice. Plaintiff recovered judgment, from which this appeal is taken. Several errors are assigned, which are stated in the opinion.

M. L. Lueck, for the appellant.

Daniel H. Grady, for the respondent.

Dodge, J. The errors principally relied on by the appellant are, *first*, that the court instructed the jury that the burden of proof was on the defendant to show misrepresentations or fraud in inducing him to enter into the contract; *second*, that the court erred in refusing to instruct the jury that, if the plaintiff procured the making of the written contract by fraud or misrepresentation, it would be no defense that the defendant did not exercise due care and intelligence to inform himself as to its contents; *thirdly*, the refusal to set aside the verdict for the reason that the same was inconsistent.

1. The rule that one who alleges misrepresentation or fraud bears the burden of proof is too well established to need discussion. Indeed, the appellant concedes it generally, but seeks to invoke the exception that, where a relationship of trust and confidence is established, the burden then shifts to the other party. No such case is here shown by the evidence, however, which merely discloses that the agent was a hardware and machinery dealer, with whom the defendant had traded for many years, and in whose integrity and business standing he had confidence. It appears that they met on the ordinary basis of buyer and seller of farm machinery. From such relations as these no inference can be drawn of that trust or confidence which constitutes this exception.

2. The instructions requested by the fifth and sixth assignments of error are to the effect that a party who procures the execution by another of a contract by fraud and misrepresentation cannot then bar a defense thereto, on the ground that the other party has been ignorant or negligent. Such instructions might have been proper and applicable in the event of a general verdict, but they had no application to any of the questions submitted by the special verdict. Further than this, they were rendered wholly immaterial by the finding of the jury that the hypothesis of fraud or misrepresentation in procuring the written instrument had no existence in this case.

3. The answer to the fifth question is not, as urged by the defendant, inconsistent with the rest of the verdict. That question, answered in the affirmative, is: "Did the defendant and the plaintiff's agent Zilisch agree that if the binder, upon trial thereof, did not suit the defendant, he might return it without notice?" The rest of the verdict merely negatives the claim that that agent misled the defendant as to the contents of the written instrument signed by him, and is not necessarily inconsistent with the making of such

an agreement as the fifth question contemplates. Such an agreement might have been made before the execution of the writing, and still the plaintiff might have signed the latter with full knowledge of its contents; or, if made after the writing, it would still be consistent with a full understanding of the paper at the time it was signed. It appears, however, that the only evidence offered by the defendant of any such agreement rather tends to establish an individual promise on the part of the agent personally, and not for his principal, the plaintiff, that the machine might be returned to him, and should be his, if not satisfactory to defendant; and the jury might well have understood the fifth question as applying to such promise. The verdict of a jury, when sustained by the trial court, is entitled to the most favorable construction warranted by the record.

The other assignments of error hardly need notice. The instructions objected to in the third and fourth assignments were correct, the question whether the plaintiff's agent had in fact misrepresented the terms of the written agreement having been properly submitted to the jury. *Fuller v. Madison Mut. Ins. Co.* 36 Wis. 599; *Pettyplace v. Groton B. & Mfg. Co.* 103 Mich. 155.

The error, if there was any, in refusing cross-examination of the plaintiff's witness Zilisch when first upon the stand, was fully cured by permitting an exhaustive cross-examination upon the same subjects when he reappeared in rebuttal.

The court did not, as asserted in the eighth assignment of error, refuse to permit the defendant to testify as to representations made to him by the plaintiff's agent at and before signing the contract. The objection sustained at the place indicated was to a question, "What was the *bargain* which you had with Mr. Zilisch in regard to that binder?"—clearly objectionable, as calling for oral testimony of an agreement which had been reduced to writing.

Equally incorrect is the assertion of the ninth assignment

of error that the court refused to permit the defendant to testify as to whether or not he *relied* upon the statements made him by the plaintiff's agent. It appears that the objection sustained was to allowing defendant to testify as to what *he thought.* That being withdrawn, he was allowed to testify that he did depend and rely upon the statements of the agent.

No other errors were insisted on in argument, and we find none.

By the Court.— Judgment affirmed.

BARDEEN, J., took no part.

STAPLETON, Appellant, vs. BRANNAN, Respondent.

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January 12 — January 31, 1899.

Fraudulent conveyances: Gifts in trust.

A debtor made a voluntary transfer of all his personalty to his wife, and at the same time a voluntary conveyance to her, through a third person, of all his realty, by a deed stating that the conveyance was made subject to the reasonable and necessary support of such debtor, and that the same was intended to be and remain a lien upon said premises during his life. *Held,* that the two conveyances must be construed together as one act, and were, within the meaning of sec. 2306, Stats. 1898, gifts in trust for the person making the same, and as such were void as against creditors.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

For the appellant there was a brief by *Ryan & Merton,* and oral argument by *T. E. Ryan.*

For the respondent there was a brief by *William Fleming,* attorney, and *Anthony B. Rogan,* of counsel, and oral argument by *Mr. Fleming.*

CASSODAY, C. J. This is an action of replevin to recover sixteen cows taken by the defendant, as city marshal, on an execution against the plaintiff's husband, John Stapleton, Sr., issued upon a judgment recovered against him December 4, 1897, for $142.29, in favor of one James C. Ward. The defendant, as such officer, justified under such judgment and execution, and alleged and claimed, in effect, that the cows were the property of the plaintiff's husband, and raised on his farm. At the close of the trial the court directed a verdict in the usual form in such cases in favor of the defendant, and that he was entitled to a return of the property; that his special interest therein was of the value of $170, and his damages for the taking and withholding thereof six cents. From the judgment entered thereon accordingly the plaintiff brings this appeal.

It is undisputed that the judgment in favor of Ward was on an indebtedness which had been incurred mostly on and prior to December 29, 1882. It is conceded that on that day John Stapleton owned a farm of 160 acres of land, subject to a mortgage of $1,800, and a large amount of personal property on the land, including several cows, from which the cows in question descended; that December 30, 1882, John Stapleton and wife conveyed the farm to one Jewett, and that Jewett at the same time conveyed the farm to the plaintiff; that such conveyances were recorded at that time; that each recited a consideration of $7,000, but that no consideration whatever was paid, each being a voluntary conveyance; that the conveyance from Jewett to the plaintiff contained this provision: "This conveyance is made subject to the reasonable and necessary support of one John Stapleton, of the said town of Merton, which is hereby intended to be and remain a lien upon said premises during his life, and which the said party of the second part agrees to fulfill and perform as part of the conditions of this obligation;" that the conveyance from John Stapleton and wife to Jewett contained a

similar provision; that at the time of the execution and delivery of such conveyances John Stapleton conveyed all his personal property — being of the value of about $1,200, including cows from which the cows in question descended — to the plaintiff by bill of sale or chattel mortgage, reciting a consideration of $1,200, but that there was no consideration therefor, the same being voluntary; that the plaintiff filed the chattel mortgage or bill of sale in the town clerk's office as a chattel mortgage for $1,200, January 3, 1883.

The chattel mortgage or bill of sale and the two deeds must be taken together, and construed as one instrument, for the purpose of determining the character of the transaction and the intention of the parties. *Gillmann v. Henry*, 53 Wis. 468; *Severin v. Rueckerick*, 62 Wis. 1; *Herbst v. Lowe*, 65 Wis. 320; *Winner v. Hoyt*, 66 Wis. 234; *Beckman v. Beckman*, 86 Wis. 659. Being one paper in law, they must either stand or fall together at law. *Id.* The substance of the transaction manifestly was that December 30, 1882, John Stapleton, while indebted to Ward and others, voluntarily and without any consideration conveyed and transferred all of his property, both real and personal, to his wife, the plaintiff, with the reservation or condition quoted above, to the effect that such conveyances and transfers should be subject to his reasonable and necessary support, which was thereby intended to be and remain a lien upon the premises conveyed during his lifetime, and which the plaintiff thereby agreed to fulfill and perform as a part of the conditions of such obligation. The question recurs whether such conveyances and transfers upon such conditions or with such reservations are valid or invalid. The statute declares that "all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." Stats. 1898,

sec. 2306. Under this statute, this court has held that, "where an insolvent debtor conveys land as a mere gift, in trust for his own benefit, the conveyance is void as against creditors, whether the grantee does or does not know of the insolvency." *Manseau v. Mueller*, 45 Wis. 430. So it has been held that "a conveyance of land and personal property by a father to his son upon condition that the son give to the parents one half of the buildings and one half of all the crops raised on the land during their lives, and one third of the avails of the land to the survivor of them, that he pay certain sums to his sister and brother after the death of the parents, and that he pay a mortgage upon the land, is held to have created a trust in the property for the maintenance of the parents and the payment of the sums specified, and to have been void, under sec. 2306, R. S. [1878], as against the creditors of the father." *Severin v. Rueckerick*, 62 Wis. 1. So it has been held that "voluntary conveyances by a judgment debtor to a third person of substantially all her property not exempt from execution, upon a trust and benefit reserved to her, are fraudulent as a matter of law." *Faber v. Matz*, 86 Wis. 370. See, also, *Grant v. Lewis*, 14 Wis. 487. Under these adjudications we must hold the conveyances void in law as against creditors.

By the Court.—The judgment of the county court of Waukesha county is affirmed.

BARDEEN, J., took no part.

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MALDANER, Appellant, vs. SMITH and others, Respondents.

January 12 — January 31, 1899.

(1, 2) *Bills and notes: Interlineations: Presumptions as to fraud.* (3–5) *Transactions with person since deceased: Witnesses: Removal of incompetency: Depositions.*

1. The mere existence of an interlineation in a note raises no presumption of a fraudulent or unauthorized alteration. In the absence of some indication other than the interlineation itself, the presumption is that it was made before delivery of the paper.
2. Where an interlineation in a note exists, but the instrument appears to have been written all at the same time, by the same hand and with the same ink, the presumptions are against a forgery, and in the absence of clear and satisfactory evidence to the contrary such presumptions should prevail.
3. The incompetency of a party under sec. 4070, R. S. 1878, to testify as to personal transactions between himself and one whom he claims to have been the agent of the adverse party, is not removable by the examination of such party otherwise than as a witness at the instance of such adverse party and the introduction of such examination in evidence by such party in his own behalf.
4. The incompetency of a party to testify under sec. 4070, R. S. 1878, is removable only by the conduct of the adverse party in the manner indicated in such section. The door for such party to testify is closed by the statute against any effort of his to open it. The adverse party must open the door, if opened at all.
5. The mere taking of a deposition does not make it evidence for either party. Though it may be offered by either, when offered it is the evidence of the party offering it, regardless of at whose instance it was taken.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Reversed.*

Action to foreclose a mortgage given to secure the payment of a note of $2,000 and the interest thereon. Defendant *George W. Smith* was the mortgagor and W. T. Rambusch the payee. Plaintiff became the owner of the note and mortgage for value before maturity, the title having been

duly transferred by indorsement of the note and delivery of the same, with a proper assignment of the mortgage. The property passed first to Henry Maldaner. He subsequently died, and his executors transferred the property to the plaintiff. The note was in form negotiable, but the words "or order," at the proper place, were interlined, though there was nothing in the appearance of the note indicating that the interlineation was not made at the time it was signed or delivered to Rambusch.

The complaint was in due and legal form. The maker of the note and his wife, *Addie E. Smith*, answered the complaint, admitting under oath the execution of the note, setting it out *verbatim* as it appeared when introduced in evidence in the case. At the opening of the trial the answer was amended so as to deny the execution of the note described in the complaint, but admit the execution of one similar in all respects, except as to the words "or order." The effect of the answer was to deny the execution of a negotiable note. The answer further alleged that Rambusch was the agent of the owner of the note and mortgage up to the time it was fully paid, and that such payment was made to such agent without notice that he was not the owner of the note. The questions litigated were whether the note was negotiable when delivered to Rambusch, whether it was thereafter changed by interlining the words "or order," and whether Rambusch received payments on the note from the maker, as agent for the owner. No payments were made except those admitted in the complaint, other than payments claimed to have been made to Rambusch as agent, which never reached the owner of the note and mortgage.

When the note was offered in evidence the court ruled as a matter of law that it was incumbent on the plaintiff to satisfactorily explain by evidence *aliunde* the interlineation of the words "or order," though there was nothing appearing on the face of the paper to cast suspicion upon it except

the fact of the interlineation. It appeared to be all in the same handwriting and to have all been written at the same time, with the same ink. It was received in evidence upon the original answer being offered in evidence.

The examination of *George W. Smith* at the instance of plaintiff, otherwise than as a witness under the statute, was received in evidence against objection. Such objection was particularly directed to that part of the examination relating to transactions between *Smith* and Rambusch, the latter having died before the trial. Upon the theory that the examination of *Smith* otherwise than as a witness, and its reception in evidence in his behalf, removed his incompetency to testify as to transactions between himself and the deceased Rambusch, he was permitted against objection to give such testimony, which included a relation of the making of various payments to the deceased, including the final payment, and of obtaining receipts therefor, and of the final surrender to *Smith* of what purported to be the note, but which was, in fact, a copy, with a portion torn out where the words "or order" occur in the original. The mortgage was not surrendered at the time the final payment was made, and no inquiry for the same was made, *Smith* being satisfied with the statement of Rambusch that he had destroyed the mortgage and satisfied it of record. There was no proof of payments other than those admitted in the complaint, except by the testimony of *Smith*, as before indicated.

Smith testified that the words "or order" were not in the note when he signed it; that he then knew the significance of such words; that it was the first note he ever gave and he remembered that when he signed it he thought the omission of such words would prevent Rambusch from selling the note; that all payments were made to Rambusch without any demand being made therefor. He explained the circumstance of his signing the answer admitting the execution of the note with the words "or order" in it, by

saying that he was hurried up and did not read the answer carefully. *Charles H. Smith*, a brother of the defendant *George*, corroborated the latter as to there being no interlineation in the note when it was executed. He said he had no object but that of curiosity in examining the note, and that nothing had occurred since its execution to call the subject to his attention; that when the note was made he had not the slightest interest in knowing the form of the note, or in remembering it.

The court found that the instrument was nonnegotiable when delivered to Rambusch; that the words "or order" were interlined therein without the knowledge or consent of the maker, after such delivery; that it was fully paid to Rambusch according to its terms before the action was commenced, and without notice on the part of the maker of its transfer to a third person. As a conclusion of law the court found that both the note and mortgage were void and that defendants were entitled to judgment. Judgment was entered accordingly, and plaintiff appealed, proper exceptions to the findings of fact having been filed to preserve for review the questions discussed and decided in the opinion.

For the appellant there was a brief by *Quarles, Spence & Quarles* and *George Lines*, and oral argument by *Mr. Lines.*

For the respondents there was a brief by *Malone & Bachhuber*, and oral argument by *J. E. Malone.*

MARSHALL, J. The most important question for consideration on this appeal is, Did the court err in finding that the words "or order" were interlined in the note after its delivery to Rambusch, and without the knowledge or consent of the maker? That being a question of fact, the determination of it by the trial court cannot be disturbed unless contrary to the clear preponderance of the evidence; but in reaching a conclusion, some rules which are well settled

must be taken into consideration. First, is the rule that he who alleges fraud must establish it by clear and satisfactory evidence. Only reasonable certainty of the existence of the fact is required, the same as in case of any other fact in a civil action. Nevertheless the presumption of innocence and fair dealing among men is so persuasive that a situation which violates it calls for evidence of a more clear and satisfactory character than one that does not involve moral turpitude or the commission of a criminal offense. Consistent with that idea, the rule is well recognized that where fraud, whether constituting a criminal offense or not, is alleged as the foundation of the action, but especially in case of the former, it must be established by clear and satisfactory evidence or there can be no recovery. The more serious the nature of the fraud charged, the more rigidly should that rule be applied. That is particularly applicable to the case before us, the charge of fraud involving the offense of forgery, a felonious crime under the statutes of this state.

Second, is the rule that the mere fact that a note has a material interlineation raises no presumption that it was changed after delivery. In this the learned trial judge made a serious mistake. It is not the law that the mere existence of an interlineation in a writing raises a presumption that it has been fraudulently altered or altered at all since delivery. The presumption of honesty is by no means so easily overcome as that, and the burden of proof put upon the person claiming under such a paper to remove a suspicion of fraud cast upon it. That we deem to be so elementary that a citation of authority to sustain it is hardly necessary. It has often been so held by this court, as shown by numerous instances cited by appellant's counsel, to which others might be added. *Williams v. Starr*, 5 Wis. 534; *Page v. Danaher*, 43 Wis. 221; *Gorden v. Robertson*, 48 Wis. 493; *Maxwell v. Hartmann*, 50 Wis. 660; *Rollins v. Humphrey*, 98 Wis. 66; *Prieger v. Exchange Mut. Ins. Co.* 6 Wis. 89; *Austin v. Aus-*

tin, 45 Wis. 523. Mr. Jones, in his late work on Evidence, after an exhaustive examination of authorities, as indicated in his notes, lays down the rule as established by the great weight of them that: "The mere fact that there is an interlineation or alteration does not, it would seem, call for an explanation, provided the appearance of the writing and ink is such as to indicate that the whole was written at the same time and by the same hand. In such a case it is clear that the usual presumption in favor of innocence and against wrong doing will obtain and the burden will rest upon the person asserting that a wrongful alteration has been made to establish it." Jones, Ev. § 578.

The learned counsel for respondents cite *Schwalm v. McIntyre*, 17 Wis. 233, to the contrary, but the court there did not pass on the question at all. It was said, in substance, that whether a written contract offered in evidence, having a material alteration, should be rejected because of a legal presumption that the alteration was made before delivery, is not decided. Counsel also cite *Page v. Danaher*, *supra*, and that appears to be what the learned trial judge relied upon, as in making the ruling he referred to what Mr. Justice COLE there said, overlooking the fact that the change in the note then under consideration was made with a different colored ink and had the appearance of having been made some time after the execution of the instrument. It was to such a paper that the language of the court was directed in saying, "Under these circumstances we think the plaintiffs were bound to give some evidence to account for the alteration," and that it would warrant the inference or conclusion that the alteration was made after the instrument became operative. The following rule by Greenleaf was adopted in that case: "If, on the production of the instrument, it appears to have been altered, it is incumbent on the party offering it in evidence to explain its appearance." The words "appears to have been altered" do not go so far as to include

a mere alteration having all the appearance of having been made before the paper was finally completed. They mean altered after delivery. In the absence of any indication that paper has been altered since its completion, execution, and delivery, it is free from suspicion notwithstanding there may be an interlineation in it. If such interlineation be neither in a different handwriting, made with a different colored ink, nor have any circumstance of suspicion indicative of an alteration subsequent to the completion of the paper, other than the mere fact of the existence of the interlineation, the latter circumstance will cast no suspicion upon it. Such, in substance, was the language of the present chief justice, speaking for the court in *Maxwell v. Hartmann*, 50 Wis. 660. For further authorities on the subject, see 1 Greenl. Ev. § 564; *Stoner v. Ellis*, 6 Ind. 152; *Gooch v. Bryant*, 13 Me. 386; *Farnsworth v. Sharp*, 4 Sneed, 55; *Sayre v. Reynolds*, 5 N. J. Law, 737; *Sedgwick v. Sedgwick*, 56 Cal. 213; *Smith v. Ferry*, 69 Mo. 142; *Dodge v. Haskell*, 69 Me. 429; *Odell v. Gallup*, 62 Iowa, 253; *Kleeb v. Bard*, 12 Wash. 140; *Farmers' L. & T. Co. v. Olson*, 92 Iowa, 770; *Sneed v. Sabinal M. & M. Co.* 73 Fed. Rep. 925; *Dorsey v. Conrad*, 49 Neb. 443; *Cosgrove v. Fanebust*, 10 S. Dak. 213.

In *Sayre v. Reynolds*, *supra*, it is said, in effect, there being nothing in the writing itself to indicate that the alteration was made after delivery, all probabilities are against the theory of forgery. And in *Wilson v. Hayes*, 40 Minn. 531, it is said that, "the signature of a note being admitted, an alteration not having any suspicious appearance is presumed to have been made before delivery." "Proof of the signature of the note *prima facie* establishes the fact that the alteration was made before execution and delivery, and casts upon the person claiming the contrary the burden of establishing his contention." Such is the law by the great weight of authority and according to previous adjudications of this court; though we recognize that there are

authorities to the contrary, yet substantially all standard text writers state the doctrine as before indicated.

We are urged by counsel for respondent to disregard the finding of the trial court as to the note having been altered after delivery, because of his erroneous view of the law. That we cannot do. It does not change the rule that the finding of the trial court on a question of fact cannot be disturbed unless against the clear preponderance of the evidence. Nevertheless the application of correct rules of law to the evidence in place of incorrect rules must necessarily have the full weight naturally resulting from such a change in the situation, in determining whether the finding is sustained by the evidence or not.

In the light of what has preceded, the situation on one side of the controversy is as follows: The mere interlineation in the note raises no presumption of a fraudulent alteration. The note itself furnishes no evidence casting suspicion upon it. It appears to have been all written by the same hand, with the same ink, at the same time. It is in the form generally adopted among business men. The probabilities are all against the taking of a nonnegotiable note, especially as it appears that it was taken in contemplation of being immediately transferred by Rambusch. The transfer occurred four days after the papers were executed. Not only is there nothing on the face of the note indicating a fraudulent alteration, but the legal presumption of innocence and all the probabilities are against it. In addition to that the maker of the note seasonably answered in this action under oath, admitting the execution of the note in the form it appeared when offered in evidence. He rested on that admission for a period of about eight months and until after he had an opportunity, when examined otherwise than as a witness, to see the original note with the interlineation therein. It is fair to conclude that it did not occur to him to amend his answer till after he saw the note at the time

indicated. The amendment was not made until the cause was called for trial about eight months after the original answer was interposed. Opposed to that is the improbable story of the maker of the note that he made the admission in the first answer because he was hurried and did not read it carefully; that the words "or order" were not in the note when he signed it, and that he remembered the fact because he did not want to give a note that could be sold. To that is added the improbable story of the maker's brother that he saw the note when it was made, and though the matter was not called to his attention again for nine years, and he had not the slightest interest in the matter, he remembered that there was no interlineation in it; that it was nonnegotiable in form. In that state of the record no other conclusion can be reached than that the finding of the learned trial court as to the interlineation being made after the note was delivered to Rambusch is against the clear and decided preponderance of the evidence. That situation is so clear that there is no reasonable explanation of the decision appealed from, other than that the erroneous idea of the law expressed by the court, that the existence of the interlineation raises a presumption that it was made after delivery, had great weight in the judicial mind and turned the scales against the plaintiff.

The next question that is presented is, Was the evidence given by *Smith*, as to his personal transactions with Rambusch, admissible? If not, there is no evidence whatever in the record of any payments other than those admitted by plaintiff, even if it be conceded that Rambusch was the agent of the owner. The court made no finding on that subject, and there is no exception by the respondent because of such failure to find, so that question is not before us in any form. But if Rambusch was not the agent of the holder of the note, then the transactions between him and *Smith* were entirely immaterial and should have been excluded on appellant's

objection on that ground. If he was such agent, then the evidence of *Smith* should have been excluded under sec. 4070, R. S. 1878, unless his incompetency was removed in the manner therein indicated. The section provides that no party circumstanced as *Smith* was shall be examined as a witness in respect to any transaction or communication by him personally with a person circumstanced as respondent claimed Rambusch was, unless the opposite party, or some other witness, shall be first examined in his behalf, in respect to some transaction or communication between the deceased agent and such opposite party, or the evidence of the agent as to the transactions be first read or given in evidence. So it is clear that the incompetency of *Smith* could only have been removed in one of two ways: First, by evidence on the trial by or on behalf of the opposite party in respect to the transactions with the deceased agent; or, second, by the giving in evidence of an examination of the agent himself taken on some occasion before his death. To meet the requirements of the statute, respondent's counsel offered in evidence the examination of *Smith* taken otherwise than as a witness. That is, instead of waiting, as the statute contemplates, for the opposite party to open the door for the admission in evidence of the otherwise incompetent testimony, respondent claimed the right to open it by offering in his own behalf his own evidence, taken otherwise than as a witness, an exceedingly novel proceeding, clearly a violation of the very letter of the statute. It would seem that it could hardly be seriously contended that the proceeding was proper. The mere fact that *Smith* was examined otherwise than as a witness, so long as plaintiff did not offer such examination in evidence, did not open the door for *Smith* to testify on the trial. The foundation for the examination of a party as to transactions with a deceased agent must be laid by the opposite party. Here the trial court reversed the rule of the statute, overlooking, obviously, the elementary principle that

a deposition or examination taken out of court does not become evidence for a party taking it, or any party to the cause, till offered and received as evidence, and that it is then evidence only for the party who offers it. In all cases where a party offers in evidence a deposition taken by the opposite party, he makes it his own evidence; the latter can then object to his own interrogatories therein, the same as if propounded by the former, and can object to the competency of the witness the same as if the deposition were taken for his adversary. Jones, Ev. § 703. The use of a deposition by one party, taken by the other, gives it no different status in the case than the evidence of a party, or of a witness called into court in his behalf, when called to the stand by his opponent. *Hazleton v. Union Bank*, 32 Wis. 34.

The singular and manifestly erroneous ruling under discussion, though contrary to the very letter of the statute and the settled practice as to the status of a deposition taken by one party when offered in evidence by his adversary, would appear at first glance to have some support in *Tomlinson v. Ellison*, 104 Mo. 105, and *Ess v. Griffith*, 139 Mo. 322. The learned trial court may have been guided by those cases. An examination of the Missouri statute, however, discloses that the incompetency of a party to testify to transactions with a deceased opposite party, or his agent, is not removable by any statutory method. The statute merely says that the witness shall be incompetent to testify, the same as it provides that a physician or an attorney shall be incompetent to testify under certain circumstances. The court held that the incompetency may be waived in the one case the same as in the other. The decisions have no application to our statute, which provides how the incompetency of a witness shall be waived if at all. The method provided by statute is exclusive.

So the conclusion reached is that the decision of the trial court as to the invalidity of the note, and as to payments

made thereon otherwise than those admitted by plaintiff, is contrary to the competent evidence in the case, and that disposes, adversely to the respondent, of all questions necessary to be considered on this appeal. It calls for a reversal of the judgment and for judgment in plaintiff's favor according to the prayer of the complaint when the case again reaches the trial court.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment in plaintiff's favor as prayed for in the complaint.

BARDEEN, J., took no part.

HALLOCK, Appellant, vs. YANKEY and another, Respondents.

102	41
111	1875
111	1876

January 12—January 31, 1899.

Promissory notes: Suretyship: Release by extension: Estoppel: Release of co-surety.

1. If a note is definitely extended in consideration of prepayment of interest by the principal maker, without the knowledge or consent of a surety, the latter is thereby released.
2. A surety on the note of a corporation who, in his capacity as an officer of the corporation, requested and procured an extension of the time for payment, is estopped to assert that he is discharged as surety because of his lack of consent as such to the extension.
3. Where one of two sureties on a note is released from liability, because the note has been extended without his consent, his co-surety is thereby, under sec. 4204, Stats. 1898, released from liability for one half the debt. The provisions of that section apply to joint sureties as well as to principal debtors, save in so far as they are limited by the proviso and by the terms of sec. 4205.

APPEAL from a judgment of the county court of Dodge county: M. S. GRISWOLD, Judge. *Affirmed as to one respondent; reversed as to the other.*

This was an action against the defendants to enforce their liability as guarantors of a promissory note. The defense was that the note had been extended by the holder thereof without the consent of the defendants, and consequently that they were released from liability. The evidence was meager, and showed that on the 23d of October, 1891, the Juneau Manufacturing Company, a corporation of Juneau, Wisconsin, borrowed $200 at the Citizens' Bank of Juneau, and executed a note for the same, payable ten days after date, with interest at eight per cent. per annum. The defendant *Yankey* was the treasurer and financial manager of the Juneau Manufacturing Company, and executed the note on behalf of the company. At the time the note was given, a written guaranty of payment was indorsed upon the back, signed by the defendants *Yankey* and *Hartzheim*, both of whom were stockholders in the corporation, and *Yankey* was, as before stated, the treasurer of the corporation. On the 3d of November, when the note fell due, it was not paid, but the interest was paid in advance for thirty days, and the bank indorsed an extension for thirty days on the back of the note, in consideration of the advance payment of interest. At the time of this extension, both *Mr. Yankey* and *Mr. Hartzheim* were present, and *Mr. Yankey*, acting for the corporation, paid the advance interest, in order to procure the extension; but it does not appear that *Mr. Hartzheim* actively participated either in the payment of the interest or in the request for the extension. The note was extended several times afterwards, and like agreements of extension indorsed upon the back, and the interest paid in advance each time by *Mr. Yankey*, as treasurer of the corporation; but the evidence does not show that *Mr. Hartzheim* had anything to do with the subsequent extensions, or even that he knew of them. The note was transferred to the plaintiff for value, before the commencement of this action. Upon this evidence the court directed a ver-

dict for the defendants, and from judgment upon such verdict the plaintiff appeals.

George W. Sloan, for the appellant, argued, among other things, that payment of interest on an *overdue* note, even for a definite period in advance, will not discharge the sureties. *Vilas v. Jones*, 10 Paige, 76; *Lowman v. Yates*, 37 N. Y. 601; *Gahm v. Niemcewicz's Ex'rs*, 11 Wend. 312; *Reynolds v. Ward*, 5 Wend. 501; *Hosea v. Rowley*, 57 Mo. 357; *Coster v. Mesner*, 58 Mo. 549; *Williams v. Smith*, 48 Me. 135; *Haydenville S. Bank v. Parsons*, 138 Mass. 53; *Oxford Bank v. Lewis*, 8 Pick. 458; *Blackstone Bank v. Hill*, 10 Pick. 129; *Central Bank v. Willard*, 17 Pick. 150; *Agricultural Bank v. Bishop*, 6 Gray, 317.

For the respondents there was a brief by *Malone & Bachhuber*, attorneys, and *Ryan & Merton*, of counsel, and oral argument by *J. E. Malone* and *E. Merton*.

WINSLOW, J. As to the defendant *Hartzheim* there can be no doubt that the verdict was rightly directed. His liability was that of a surety alone, and, upon very familiar principles of law, he was discharged if the time of payment of the note was definitely extended by a valid agreement without his consent. *Weed Sewing Machine Co. v. Oberreich*, 38 Wis. 325. Whatever may be the fact as to *Hartzheim's* presence at the time of the first extension of the note, it appears without dispute that the note was definitely extended in consideration of the prepayment of interest a number of times afterwards, without his presence or consent. The payment of interest in advance is a sufficient consideration for the agreement of extension of time. *Batavian Bank v. McDonald*, 77 Wis. 486.

As to *Yankey*, however, the question is different. The evidence seems to show satisfactorily that he was the acting officer of the corporation, not only in executing and delivering the note originally, but in paying the interest in advance

at the time of each extension. There is certainly sufficient evidence to justify a jury in finding that he, in legal effect, requested each extension of time, and paid the advance interest in order to secure such extension. It is true that he made such requests and payments in his capacity as an officer of the corporation and on its behalf, and that nothing was said as to his individual liability as guarantor; and the question presented is whether, having requested and consented to the extension on behalf of the corporation, he can be heard to say that he did not thereby consent to the extension in his individual capacity as guarantor. Of course, the obligations of a surety are *strictissimi juris.* He may stand upon the letter of his contract. He may have knowledge that an extension has been granted to his principal, and the law does not impose on him the duty to speak. 2 Brandt, Suretyship & G. § 345. But the surety is bound by the rules of good faith and fair dealing, as well as other men. If he, as agent for the principal debtor, requests and obtains an extension of time, and pays the consideration for such extension, and nothing is said as to his liability as surety, it is very obvious that the creditor would naturally and almost inevitably conclude that he consents to the extension individually, as well as in his capacity as agent. How many bankers or business men would reason thus, "*Yankey* has consented to the extension as treasurer of the corporation, but has not consented in his individual capacity, and I must now ask him if he consents as *Mr. Yankey*"? We think very few would think of drawing such fine lines of distinction. After *Yankey* requested and procured the extension on behalf of the corporation, and gave no notice to the creditor that he did not consent to an extension in his character as surety, we think that well-known rules of estoppel must be held to prevent him from asserting that he is discharged as surety because of lack of consent. He has actively induced a change of position on the part of his creditor, which

he will not be allowed to take advantage of, to his creditor's injury.

Another question here arises, namely, as to the effect of the discharge of *Hartzheim* upon the liability of *Yankey*. While his discharge is, in effect, a discharge by operation of law, still it resulted from the act of the creditor in extending the time of payment without the surety's consent; consequently, it must be given the same effect as a voluntary release. *Robertson v. Smith*, 18 Johns. 459. There is no doubt but that the provisions of sec. 4204, Stats. 1898, apply to joint sureties as well as to principal debtors, save in so far as they are limited by the proviso and by the terms of sec. 4205. Neither of these limitations includes the present case. Therefore the release of *Hartzheim* will operate to relieve his co-surety from liability for one half of the debt, that being the proportion which *Hartzheim* ought to have paid as between himself and *Yankey* had he not been released. There must be a new trial as to *Yankey*, but his liability in no event can exceed one half of the note and interest.

By the Court.—As to *Hartzheim* the judgment is affirmed, with costs, and as to *Yankey* it is reversed, with costs, and the action is remanded for a new trial.

BARDEEN, J., took no part.

IN RE WILL OF BRUENDL.

January 12—January 31, 1899.

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(1) *Physicians and surgeons: Privileged communications.* (2) *Transactions with person since deceased: "Party."*

1. Information acquired by a physician while examining a person, not for the purpose of curing or helping her, but to determine the question of her mental competency with a view to an application for

her release from guardianship, is not "information necessary to enable him to prescribe for such patient as a physician," within the meaning of sec. 4075, R. S. 1878, and the physician may, therefore, give testimony thereof.

2. An officer of a corporation which is a party to an action in which the opposite party claims under a deceased person is not himself a "party" so as to be incompetent, under sec. 4069, R. S. 1878, to testify in respect to transactions had by him personally with such deceased person.

APPEAL from a judgment of the circuit court for Ozaukee county: JAMES J. DICK, Circuit Judge. *Reversed.*

1. The proposed will of the deceased was contested on the ground of mental incompetency and of undue influence. The case was tried in the circuit court for Ozaukee county, sitting with a jury. A verdict of the jury in favor of competency, and against undue influence, was rendered, and a finding by the court was made to the same effect, and the will admitted to probate. The contestants offered the testimony of two physicians, partners, one of whom had been the attending physician of the deceased, and to whom her son-in-law applied to make an examination of her mental condition about four months before the date of the will, to ascertain as to her mental competency to care for her own property, with a view to applying to the county court for release from guardianship, under which she had been placed with her own consent. She submitted herself to the examination for this purpose. The court, after ascertaining that the knowledge of these physicians was thus obtained, excluded their testimony as privileged, under the provisions of sec. 4075, R. S. 1878, which constituted the first error assigned.

2. Among the bequests was one of $400 to a church. The proponents offered as a witness, to prove mental competency by interviews and conversations with the deceased, the pastor of that church, who was vice-president of its corporation. He was objected to as a party in interest, and incompetent

to testify to personal transactions, under sec. 4069. The objection was overruled, which constitutes the second assignment of error. The contestants also assign error for refusing certain instructions and for admitting the will to probate.

Edgar L. Wood, for the appellants, to the point that information acquired by physicians in making an examination for the purpose of determining the question of sanity is not privileged, cited *Nesbit v. People*, 19 Colo. 441; *People v. Sliney*, 137 N. Y. 570.

H. B. Schwin, for the respondent.

DODGE, J. 1. Sec. 4075, R. S. 1878, is for the benefit and protection of the patient, and its prohibitions can be waived in her lifetime only by the patient, and not by the physician. *Boyle v. N. W. Mut. R. Asso.* 95 Wis. 312. The purpose of the statute, as pointed out by Mr. Justice PINNEY in that case, is to facilitate and make safe full and confidential disclosure by patient to physician of all facts, circumstances, and symptoms, untrammeled by apprehension of their subsequent enforced disclosure and publication on the witness stand, to the end that the physician may form a correct opinion, and be enabled safely and efficaciously to treat his patient. The legislature has decided wisely that public policy requires such measure of restriction upon the freedom of the physician to testify or of others to demand testimony. But as it rested with the legislature to discover the necessity for, and to effectively impose, such restrictions, which are in derogation of the common law, it is for the courts only to enforce such as have been imposed and not others which the legislature has omitted. The seal placed on the lips of the physician only relates to "information necessary to enable him to prescribe for such patient as a physician." The tendency of all courts has been and should be toward liberal construction of these words to effectuate the purpose of the statute. Thus, it has been held that the word "necessary" should not be so restricted as to permit testimony of state-

ments or information in good faith asked for or given to enable intelligent treatment, although it may appear that the physician might have diagnosed the disease and prescribed for it without certain of the information, so that it was not strictly necessary. *Sloan v. N. Y. C. R. Co.* 45 N. Y. 125; *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 281; *Renihan v. Dennin*, 103 N. Y. 573. So, also, the word "prescribe" is not to be used in its most limited sense of writing an order upon an apothecary for specific drugs, but should be given as liberal and enlarged an effect as the word itself will bear in the connection found.

Applying such rule, it is nevertheless apparent that the word "prescribe," when used as applicable to physicians, embodies the purpose of cure, remedy, or alleviation. The word means "to advise, appoint, or designate as a remedy for disease." Cent. Dict. Indeed, the counsel for proponents has the same understanding. He says in his brief: "The word 'prescribing,' used in the statute, does not only apply to prescribing medicines. It has a broader sense. After a physician has professionally examined a patient, he may find that the patient does not need any medicine, but that he needs different air, different food, different employment, must keep away from bad company, etc., and advises him what to do *so as to regain his health.*" We think, therefore, that the purpose to cure or alleviate is an essential element in the meaning of the words "to prescribe as a physician," as used in this statute, and that the prohibition against disclosing information only applies when such purpose is present. It may be contended, not without force, that there is the same reason for confidence when the examination is only to ascertain whether a certain disease exists, without any purpose that the physician shall attempt any prescription or advice for cure, but the legislature has not seen fit to so declare, and such a case is as it was before the statute.

In the present case, the purpose of attempting anything

remedial was wholly wanting in the interview between the medical witnesses and the deceased. The question was not whether resumption of control over her property would or would not be beneficial to her physically or mentally, but whether her mental condition was such that the county court would be likely to restore such control to her. Advice, if any, was sought, not with reference to treatment of any disease, but as to whether to make an application to the court. We hold, therefore, that the information obtained by the physicians at the interview of September 18, 1896, was not necessary, and was not obtained, for the purpose of enabling them to prescribe for the testatrix as physicians, and therefore they were not incompetent to give testimony thereof.

2. No error was committed in admitting the testimony of the pastor, vice-president of the church which was a legatee. Here, as in the above discussed assignment of error, the statute must control. Sec. 4069 only excludes "parties," and does not, as do the statutes of many states, exclude all those interested in the result. The church corporation was the party, and, although the officers and members of a corporation may be more or less directly interested in the result, the legislature has not seen fit to exclude them as witnesses in an action between the corporation and representatives of decedents or insane. An attempt was made in *Hanf v. N. W. M. A. Asso.* 76 Wis. 450, to extend this statute to agents of the corporation litigant, on the contention that, since a corporation could testify only by its agents, the purpose of the statute extended to such testimony, but the contention was overruled. An officer differs not at all from an agent, except that he usually has a pecuniary interest. That, however, does not bring him within the terms of the legislation. *New Jersey T. & S. D. Co. v. Camden S. D. & T. Co.* 58 N. J. Law, 196; *Ullman v. Brunswick T., G. & L. Co.* 96 Ga. 625; *Bopple v. Supreme Tent*, 18 App. Div. (N. Y.), 488.

As the conclusion reached upon the first assignment of error will necessitate reversal, we need make no comment on the remaining errors assigned, nor upon the sufficiency of the evidence to support the finding of the circuit court.

By the Court.—Judgment reversed, and cause remanded for a new trial.

BARDEEN, J., took no part.

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WINKELMANN, Guardian, Respondent, vs. BRICKERT and another, Appellants.

January 13—January 31, 1899.

Bills and notes: Payments to supposed agent.

The purchaser of a negotiable note and the mortgage securing it is not chargeable with payments thereafter made by the mortgagor to a third person who did not have possession of the papers and was not the agent of the purchaser, where the latter did no act authorizing a belief that an agency existed.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Malone & Bachhuber*, and oral argument by *J. E. Malone.*

Harlow Pease, for the respondent.

WINSLOW, J. This is an action for the foreclosure of a mortgage upon real estate executed January 29, 1883, and owned by the plaintiff. The sole question in issue between the parties was whether W. T. Rambusch was the agent of the plaintiff during the years 1892 to 1896, inclusive, so that certain payments made during those years by the defendant mortgagors to Rambusch should be credited upon the mort-

gage. The plaintiff bought the note and mortgage July 2, 1892; the note was negotiable, and was not then due. The purchase was made of the Citizens' Bank of Juneau, through Mr. Hemmy, the cashier, and the plaintiff has had possession of the same ever since. The defendants thereafter made several payments of interest and instalments of principal to Rambusch, believing him to be the agent of the owner of the mortgage. He was not such agent, and he converted the moneys to his own use. The testimony not only shows that Rambusch was not the agent of the plaintiff, but that the plaintiff had never done any act which would authorize any one to think so. The defendants were grossly negligent in making payments to Mr. Rambusch without production of the note or any proof that he was authorized to receive such payments. The court held that the agency was not proven, and hence that the payments could not be credited, and the finding is the only one that the evidence would justify. A more detailed statement of the evidence would not be useful.

By the Court.— Judgment affirmed.

BARDEEN, J., took no part.

CRAWFORD, Appellant, vs. CHRISTIAN and wife, Respondents.

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January 13 — January 31, 1899.

Evidence: Mental capacity: Opinion of nonexpert: Cross-examination: Appeal.

1. The opinion of a nonexpert witness as to the mental condition of a person cannot properly be received in evidence until such witness has first qualified himself by stating facts within his personal knowledge and means of personal observation, such as to satisfy the court of his ability to give an intelligent opinion liable to be of some assistance to the jury in coming to a correct conclusion.

2. A witness cannot properly be cross-examined as to a mere collateral matter, not affecting his credibility, but tending to disgrace him.
3. The findings of the trial court will not be disturbed on appeal unless clearly against the preponderance of the evidence.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J DICK, Circuit Judge. *Affirmed.*

Action to set aside a conveyance of real estate on the ground of fraud and undue influence. The answer put the material allegations of the complaint in issue. The court found the facts as follows: April 17, 1895, plaintiff was the owner of the property described in the complaint. On that day he conveyed the same to *Carl Christian* for the sum of $4,101. He had sufficient mental capacity to conduct the necessary business transactions to sell and convey his property as he did. Neither *Carl Christian*, nor any agent for or other person acting in his behalf, was guilty of fraud or undue influence in securing a conveyance of the property, but it was conveyed by plaintiff freely and voluntarily, according to his own wish in the matter. The consideration for the conveyance was a fair measure of the value of the property. As conclusions of law the court found, in substance, that plaintiff failed totally to establish his cause of action, and that defendants were entitled to a judgment against the plaintiff for their costs and disbursements in the action. Judgment was entered accordingly, and plaintiff appealed.

For the appellant there was a brief by *Malone & Bachhuber*, and oral argument by *J. E. Malone.* They argued, among other things, that the conveyance ought to be set aside because the evidence showed that the plaintiff was weak-minded and unable to understand business transactions; that he sold his farm for a very inadequate price, and without taking proper advice, but under undue influence. *Cole v. Getzinger*, 96 Wis. 559; *Harding v. Handy*, 11 Wheat. 104, 125; *Jackson v. King*, 4 Cow. 207, 220; *Hall v. Perkins*,

3 Wend. 626, 631; *Taylor v. Taylor*, 8 How. 183; *Wheeler v. Smith*, 9 How. 55, 82; *Watkins v. Brant*, 46 Wis. 419, 428; *Knott v. Tidyman*, 86 Wis. 164.

George W. Sloan, for the respondents.

MARSHALL, J. It is not considered necessary or advisable to discuss at any considerable length the assignments of error urged on this appeal. The cause appears to have been fairly tried and the record free from any prejudicial error.

The evidence of a nonexpert witness as to the mental condition of plaintiff was properly rejected, there being no foundation for a nonexpert opinion from the witness. Such an opinion may properly be given as evidence on the subject of mental unsoundness, but only upon the witness first qualifying himself by stating facts within his personal knowledge and means of personal observation, such as to satisfy the court of his ability to give an intelligent opinion liable to be of some assistance to the jury in coming to a correct conclusion. Such evidence is an exception to the general rule which confines a nonexpert witness to a statement of facts only. The exception applies solely when the qualification of the witness is first satisfactorily shown in the manner indicated. *Burnham v. Mitchell*, 34 Wis. 117; Jones, Ev. § 366; Rogers, Expert Testimony, § 6.

Some remarks were made by the court during the trial, to which exception was taken. They were certainly not prejudicial, as the presiding judge was to decide all questions of fact as well as law.

The cross-examination of a witness on a mere collateral matter, not affecting credibility, but tending to disgrace the witness, was properly excluded. *Emery v. State*, 101 Wis. 627; Jones, Ev. § 836.

The other assignments of error are all directed to whether the findings of fact are sustained by the evidence. The record has been examined with care and without discover-

ing any good reason for disturbing the decision of the trial court, under the familiar rule that such decision must prevail unless clearly against the preponderance of the evidence. That rule applies here the same as in other cases tried by the court.

By the Court.—Judgment affirmed.

BARDEEN, J., took no part.

An extensive note upon the subject of nonexpert opinions as to sanity or insanity is appended to the case of *Ryder v. State* (100 Ga. 528), in 38 L. R. A. 721.—REP.

IN RE WILL OF HOPPE.

January 13—January 31, 1899.

Wills: Heir as subscribing witness: Evidence: Transactions with person since deceased.

1. An heir of a testator, for whom no provision is made in the will, is a competent subscribing witness thereto.
2. An heir of a testator, if not provided for in the will, is a party adverse to the proponents in the probate proceedings, and is not incompetent under sec. 4069, R. S. 1878, to testify on behalf of such proponents to transactions by him personally with the deceased.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

Probate of the will was opposed on the ground of lack of testamentary capacity and for undue influence. One of the witnesses to the will was a son and heir of the deceased, to whom no bequest or devise was made therein. He was objected to as not a competent witness. The other subscribing witness, without objection, testified to all the material elements of the execution of the will. The circuit court found existence of testamentary capacity and absence of

undue influence, and admitted the will to probate, from which judgment this appeal is brought.

For the appellants there was a brief by *Malone & Bachhuber*, and oral argument by *J. E. Malone*. They contended, *inter alia*, that the will was not executed as required by sec. 2282, Stats. 1898, not being attested by two or more *competent* witnesses. The son was disqualified from testifying to transactions or communications with his father. *In re Valentine's Will*, 93 Wis. 45; *Georke v. Georke*, 80 Wis. 516; *Will of Silverthorn*, 68 Wis. 372; *Holcomb v. Holcomb*, 95 N. Y. 316; *Matter of Bernsee*, 141 N. Y. 389.

For the respondent there was a brief by *Harlow Pease* and *C. R. Blumenfeld*, and oral argument by *Mr. Pease*.

DODGE, J. 1. William Hoppe, the son, to whom no bequest was made, was a competent subscribing witness. Secs. 2284, 2285, R. S. 1878, evidently contemplate attestation of wills by heirs and others interested in the estate, provided they are not beneficiaries under the will in excess of their rights independent of it. Beneficial interest under the will is the test. *In re Lyon's Will*, 96 Wis. 339.

He was not incompetent under sec. 4069. True, he was a party. The legatees and devisees are parties on the one side, and the heirs at law the parties on the other side, in probate proceedings. *In re Valentine's Will*, 93 Wis. 45, 51, quoting *Hall v. Allen*, 31 Wis. 691. He was, however, called by the proponents of the will—the adverse parties,—the only ones who had any right to object to his competency. It is always in the discretion of the adverse party to waive the protection afforded by sec. 4069, either by refraining from objection, or by offering testimony of another witness; and he may equally waive it by calling his opponent and examining him as a witness to personal transactions. *Becker v. Foster*, 64 Ill. App. 192; *Taylor v. Ainsworth*, 49 Neb. 696.

2. The finding of the court, either as to mental compe-

tency, or as to absence of undue influence, is not against the preponderance of the evidence. Even should the testimony of the son William Hoppe be not considered, there would remain sufficient evidence to support the findings.

The taxable costs of both parties should be paid out of the estate.

By the Court.—Judgment affirmed.

BARDEEN, J., took no part.

HEMMY, Administrator, Respondent, vs. HAWKINS, Appellant.

January 14—January 31, 1899.

Estates of decedents: Pledge of assets by executor: Misappropriation of proceeds: Notice.

1. A pledge by an executor of the assets of the estate, even though made to secure a loan for his own personal benefit, is valid if the pledgee has no knowledge or notice of the intended perversion of the proceeds, but takes the property in good faith.
2. An executor wrote to the defendant, from whom he proposed to borrow money, that the county judge would make an order in regard to a loan, and then he would be ready to take it. After receiving a favorable reply, he sent to the defendant a note signed by him as executor, also a note and mortgage belonging to the estate, assigned by him as executor, as collateral. In a letter accompanying the instruments he requested the defendant to place the larger part of the money in the bank to his (the executor's) credit, and retain the balance for awhile "as that is mainly to pay expenses of administration, part of it coming to me." *Held*, insufficient to charge the defendant with knowledge that the loan was not made for the benefit of the estate.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Reversed.*

The plaintiff, as administrator *de bonis non* with the will

annexed of the estate of Lucinda Cutler, deceased, brings this action to recover the value of a note of $3,500 and interest, executed by George Hams to said deceased, May 13, 1889, together with the real-estate mortgage securing the same. The complaint contains the necessary allegations showing the representative character of the plaintiff, that the note and mortgage are assets of said estate, and that the same have been converted by the defendant to his own use. The answer admits the representative character of the plaintiff, and the execution of the note and mortgage, and alleges ownership in himself of said note and mortgage, as collateral security to a loan of $2,500, made by him March 20, 1890, to one Rambusch, who was then executor of the estate of Lucinda Cutler, and assigned the note and mortgage to the defendant as such executor. There was little, if any, dispute about the facts, and they were substantially as follows:

The note and mortgage in question were executed on the 13th day of May, 1889, to the order of Lucinda Cutler, who was then alive, and were owned by her. On the same day she made her will, by which she gave her husband, John A. Cutler, the use of her household furniture and the interest on $1,500 during his natural life, and also gave other legacies, amounting to $2,000, to her children and grandchildren, and provided for the division of the $1,500 in which her husband had a life interest, among her children, after his death. The will also appointed William T. Rambusch, of Juneau, executor and trustee for the investment of the $1,500. Lucinda Cutler shortly afterwards died, and the will was probated on the petition of Rambusch, on the 25th of June, 1889, and Rambusch was appointed and qualified as executor. He filed no inventory, and paid no claims against the estate, and rendered no account of his administration. The estate seems to have consisted simply of the $3,500 note and mortgage, and a small amount of household furniture. The defendant, *Hawkins*, lived at Watertown, Wisconsin, and

As the conclusion reached upon the first assignment of error will necessitate reversal, we need make no comment on the remaining errors assigned, nor upon the sufficiency of the evidence to support the finding of the circuit court.

By the Court.—Judgment reversed, and cause remanded for a new trial.

BARDEEN, J., took no part.

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WINKELMANN, Guardian, Respondent, vs. BRICKERT and another, Appellants.

January 13—January 31, 1899.

Bills and notes: Payments to supposed agent.

The purchaser of a negotiable note and the mortgage securing it is not chargeable with payments thereafter made by the mortgagor to a third person who did not have possession of the papers and was not the agent of the purchaser, where the latter did no act authorizing a belief that an agency existed.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Malone & Bachhuber*, and oral argument by *J. E. Malone.*

Harlow Pease, for the respondent.

WINSLOW, J. This is an action for the foreclosure of a mortgage upon real estate executed January 29, 1883, and owned by the plaintiff. The sole question in issue between the parties was whether W. T. Rambusch was the agent of the plaintiff during the years 1892 to 1896, inclusive, so that certain payments made during those years by the defendant mortgagors to Rambusch should be credited upon the mort-

gage. The plaintiff bought the note and mortgage July 2, 1892; the note was negotiable, and was not then due. The purchase was made of the Citizens' Bank of Juneau, through Mr. Hemmy, the cashier, and the plaintiff has had possession of the same ever since. The defendants thereafter made several payments of interest and instalments of principal to Rambusch, believing him to be the agent of the owner of the mortgage. He was not such agent, and he converted the moneys to his own use. The testimony not only shows that Rambusch was not the agent of the plaintiff, but that the plaintiff had never done any act which would authorize any one to think so. The defendants were grossly negligent in making payments to Mr. Rambusch without production of the note or any proof that he was authorized to receive such payments. The court held that the agency was not proven, and hence that the payments could not be credited, and the finding is the only one that the evidence would justify. A more detailed statement of the evidence would not be useful.

By the Court.— Judgment affirmed.

BARDEEN, J., took no part.

CRAWFORD, Appellant, vs. CHRISTIAN and wife, Respondents.

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January 13 — January 31, 1899.

Evidence: Mental capacity: Opinion of nonexpert: Cross-examination: Appeal.

1. The opinion of a nonexpert witness as to the mental condition of a person cannot properly be received in evidence until such witness has first qualified himself by stating facts within his personal knowledge and means of personal observation, such as to satisfy the court of his ability to give an intelligent opinion liable to be of some assistance to the jury in coming to a correct conclusion.

v. Comm. 30 Pa. St. 536. Such a deposit of trust funds to the executor's individual credit was, in law, an appropriation to his own use.

WINSLOW, J. We have been unable to find any evidence in the record to support the finding of the court to the effect that the defendant, *Hawkins*, knew that Rambusch borrowed the $2,500 for his own personal use and not for the purposes of the estate. On the contrary, it appears very clearly that Rambusch represented to *Hawkins*, in effect, that the money was borrowed for the purposes of the estate, and also that Rambusch was a man respected and trusted in the community, and that there were no facts appearing which would have put a reasonable man upon inquiry, or raise a suspicion that Rambusch expected to make any improper use of the money borrowed. Under these circumstances, the law is quite well settled to the effect that the pledge was valid. The principle is well expressed in the case of *Smith v. Ayer*, 101 U. S. 320–326, thus: "There is no doubt that, unless restricted by statute, an executor can dispose of the personal assets of his testator by sale or pledge for all purposes connected with the discharge of his duties under the will; and even where the sale or pledge is made for other purposes of which the purchaser or pledgee has no knowledge or notice, but takes the property in good faith, the transaction will be sustained, for the purchaser or pledgee is not bound to see to the disposition of the proceeds received. But the case is otherwise where the purchaser or pledgee has knowledge of the perversion of the property to other purposes than those of the estate, or the intended perversion of the proceeds." See, also, Schouler, Ex'rs, §§ 349, 350; *Gottberg v. U. S. Nat. Bank*, 131 N. Y. 595. The powers of an executor with regard to the sale or pledge of assets are much broader than those of a trustee, because the executor takes title to the personal property and is presumed to have the

right to transfer. Schouler, Ex'rs, § 350. It does not necessarily follow from the fact that the pledge was valid that the estate is liable for the loan, nor is that point decided in this case.

It is claimed that $472.50 of the $2,500 debt from Rambusch to *Hawkins* was not advanced by *Hawkins*, but consisted of a past-due debt owing by Rambusch to *Hawkins*, for interest money collected, and hence that, so far as this sum is concerned, Rambusch pledged the assets of the estate to pay his own debt, which he could not legally do. *Weir v. Mosher*, 19 Wis. 311. There is, however, no evidence showing affirmatively that this $472.50 was in Rambusch's hands when he negotiated the loan of *Hawkins;* but the evidence rather tends to show that the interest moneys were collected after the loan was negotiated, and when *Hawkins* really owed Rambusch $500 upon the loan, and that the interest moneys were simply set off against the money which *Hawkins* would otherwise have forwarded to Rambusch to complete the loan.

By the Court.— Judgment reversed, and action remanded with directions to render judgment dismissing the complaint.

BARDEEN, J., took no part.

SMALL, Administrator, Respondent, vs. CHAMPENY, Appellant.

January 16 — January 31, 1899.

(1-3) *Mental incompetency: Evidence: Adjudication: Presumption as to prior condition.* (4-6) *Fraud: Evidence: Admissions: Burden of proof: Instructions to jury.*

1. An adjudication of mental unsoundness *per se* is evidence only of the mental condition of the subject at the time of such adjudication, and thereafter upon the theory that a condition of mind once shown to exist is presumed to continue.

2. An instruction that an adjudication of mental unsoundness may relate back presumptively to a prior date, as evidence of the mental condition at such date, *held* error.
3. When the condition of mind of a person is shown to have been the same for a considerable period of time, an adjudication as to such condition at one date during the period is competent evidence when the act claimed to have been affected by such condition occurred at a prior date, upon the theory that it is reasonable to say that appearances determined at one time during the period to indicate insanity or incompetency, indicate the same at other times during such period, whether before or subsequent to the adjudication.
4. The admissions of an alleged defrauded party, made long after the act sought to be avoided for fraud occurred, are not admissible as evidence to affect the title to property involved.
5. The giving of an instruction on a material point, susceptible of two constructions, one that condemns it and one that does not, where the jury may have adopted either construction, is reversible error.
6. In the submission to a jury of a cause of action, predicated on circumstances which in law raise a presumption of fraud or undue influence, it is improper to say that the burden of proof is on the person charged, to disprove it. The true rule is that when circumstances are established from which, as a matter of law, a presumption of fraud or undue influence arises, then the burden of proof is on the party charged with being guilty thereof to show that he is innocent and that the alleged defrauded party acted voluntarily and of his own free will.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

Action of replevin brought in the lifetime of William Champeny by his guardian to recover certain promissory notes claimed to have been obtained from him by the defendant by means of fraud and undue influence, before he was placed under guardianship. The guardian was appointed by reason of the old age and incompetency of Champeny to do business and take care of his property. The ward died after the action was brought. It was revived in the name of the administrator and was thereafter tried, the verdict and judgment being for the plaintiff. Defendant appealed.

For the appellant there was a brief by *D. J. Hemlock*, attorney, and *O'Connor, Hammel & Schmitz*, of counsel, and oral argument by *J. L. O'Connor* and *Mr. Hemlock*.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*.

MARSHALL, J. The right of plaintiff to recover depended on whether the deceased, William Champeny, was competent to transact his business at the time he parted with the property in controversy to the defendant. About four and one-half months after the transaction, there was an inquest before the county judge as to Champeny's mental condition. Such inquest was had on an application for the appointment of a guardian. As a part of the proceedings, Champeny's testimony was taken, and among other things he testified at length as to his business relations with the defendant, particularly in regard to the property in controversy in this case. The result of the inquest was that Champeny was adjudged incompetent to attend to his business affairs, and a guardian for him was accordingly appointed. The evidence of Champeny on the hearing and the adjudication which followed were, against defendant's objections, admitted as evidence for plaintiff on the trial in question, and that is assigned as error on this appeal.

The general rule is, that an adjudication as to mental soundness is direct evidence of the fact at the time of the adjudication, and presumptive evidence of the condition of the subject at a subsequent time, upon the theory that a condition of mind once shown to exist is presumed to continue. It is not evidence of itself of the mental soundness of the subject at any time prior to the adjudication. In the absence of independent evidence showing that the same condition of mind existed at the prior time as at the time of the adjudication and had been continuous in the meantime, it is not admissible at all in a controversy as to such condition

at such prior time. That is the state of the law as laid down in previous adjudications of this court, and no reason is perceived for departing from it. Such is the law also according to standard text writers and courts generally.

It is often said, as in *Burnham v. Mitchell*, 34 Wis. 117, that an adjudication of insanity is not evidence of the condition of the person to whom it relates prior to its date. That is perfectly consistent with what has been said. True, it is said in *Giles v. Hodge*, 74 Wis. 360, that the result of the adjudication in *Burnham v. Mitchell* was introduced to prove mental capacity reaching back many years, but the court did not say, certainly did not intend to say, that such evidence was proper *per se*. The admission of the evidence there was held not prejudicial because the court, by the charge, expressly limited its effect to the time when the adjudication was made. The evidence was likewise limited in *Giles v. Hodge*, the court saying, in substance, that the adjudication, though some days after the filing of the petition, was expressly of the date of the petition, and on such date the deeds were made, the validity of which was challenged because of the incompetency of Giles to make them. The court said there is no doubt of the general principle that the adjudication cannot relate back to a prior time as evidence of incapacity, *but when it is shown that the mental condition had been the same for a considerable length of time and was the same at the time of the act to be affected by it as when the adjudication was had*, the adjudication is competent evidence. Although that was not strictly necessary to the decision of the case, because, as indicated, the court held that the adjudication, by its terms, included the very day on which the act affected by the alleged insanity took place, yet on the theory of the party challenging the competency of the adjudication as evidence, that is, that the transaction which was the subject of controversy took place a few days prior to such adjudication, the admissibility of it in connection

with other evidence was a proper subject for discussion and decision. So what was said in that line must be considered the correct rule of law according to the deliberate judgment of this court then expressed, till some *contra* declaration shall have been made, and no reason is perceived now for departing from that rule. As before stated, however, that does not militate at all against the principle that such an adjudication, of itself, is not evidence of the condition of the party affected by it at any prior time. It tends that way only when the condition of the person is shown to have been the same for a considerable period of time, including the prior date and the adjudication. Then a decree of mental incompetency at one date during the period is evidence tending to show that the circumstances which indicated insanity at one time indicated the same at other times during such period. That appeals to our reason and common sense as to what ought to be the law, and the decisions of courts elsewhere support it, as indicated in the citations found in the opinion in *Giles v. Hodge*, *supra*.

In *Ashcraft v. De Armond*, 44 Iowa, 229, the mental condition of the subject was shown for a period of many years, reaching to a time long after the act claimed to have been affected by it, all tending to show gradual mental decay, reaching, finally, total inability for mental action. Under those circumstances the court held that evidence of the mental condition after the act complained of, in connection with all the other evidence on the subject, was proper. Again, in *Terry v. Buffington*, 11 Ga. 342, the act called in question was the making of a will in 1844. Evidence was produced tending to show that the testator's mental condition was the same before that time and continuously down to 1849. In that state of the case expert evidence was held proper to show that the testator was incompetent at the latter date, 1849. "*Per se*," said the court, "the proof was objectionable; taken in connection with the other evidence

it was relevant and proper." Keeping in mind the distinction between an adjudication of mental unsoundness as evidence, unsupported by evidence of prior mental condition, where that is the real subject of controversy, and such evidence in connection with other evidence showing that the prior condition and appearances of mental unsoundness were the same as at the time of the adjudication, it will readily be seen that all the cases holding that such an adjudication is not evidence of mental condition at a prior time are in perfect harmony with the rule we say was announced by this court in *Giles v. Hodge*, and which is now affirmed. But, as said in *Terry v. Buffington*, the converse of the rule that insanity once judicially established is presumed to continue, is not the law. That is, it does not relate back as well as continue. In the language very properly used by the learned counsel for appellant on the argument, the presumption springing from the adjudication is not retroactive.

In view of what has preceded, it must be held that the admission in evidence of the adjudication made over four months after the act sought to be impeached, was error. There was no competent proof, as appears, warranting the finding that Champeny was in substantially the same condition of mind continuously from before the transfer of the property to defendant, down to the time he was placed under guardianship. That being the necessary foundation for the admission of the adjudication, and it being absent, the error of the trial court is clear. We shall not take time to go through the evidence in detail to demonstrate want of the necessary preliminary proof, but rest the matter with stating our conclusion that it is not in the record. Probably, if the trial judge looked at the matter from a correct legal standpoint, the evidence of the deceased taken before the county judge was deemed to be sufficient, with the other evidence, to pave the way for the admission of the appointment of the guardian. But the evidence of Champeny was

clearly incompetent. The learned circuit judge said that it was admitted as admissions of Champeny, overlooking the well-known rule that the admissions of a vendor or transferrer of property, subsequently made, are not admissible in evidence to affect the vendee's or transferee's title. That principle is elementary. *Grant v. Lewis*, 14 Wis. 487; *Selsby v. Redlon*, 19 Wis. 17. No good reason has been or can be suggested to uphold the admission of that testimony. Its admission alone necessitates a reversal of the judgment.

The court gave to the jury quite a long, involved instruction as to the effect, as evidence, of the appointment of the guardian. The instruction is too long to admit including it *verbatim* in this opinion. Suffice it to say that the jury may well have understood from the judge's language, and probably did understand, that they were at liberty to presume from the adjudication that the incompetency thus found related back by way of inference four months and a half to the time when the act alleged to have been affected by mental unsoundness occurred. "It is the general rule," said the court, "that such an adjudication cannot relate back to a prior time as evidence of incapacity at such prior time, *except by a presumption that it continued.*" That is a pretty clear indication that the learned court entertained the idea that an adjudication of incompetency as independent evidence is competent, by relation, to establish mental unsoundness at a prior date. True, there is other language in the charge, indicating a view that if there was evidence of a condition of mental decay which existed for a considerable length of time, reaching down to and including the date of the adjudication, such adjudication might be considered as evidence in connection with the other evidence of the mental condition of Champeny at a date prior to such adjudication, and within the period covered by such evidence of prior condition. But that was not said in such a way but that a professional man, even, might easily have understood that the

adjudication itself would relate back, presumptively. If we could say the charge admits of a construction in accordance with correct legal principles, it must yet be deemed prejudicial, so long as we must say it also admits of a contrary meaning and the jury were quite liable to have been misled thereby. *Gibbons v. W. V. R. Co.* 62 Wis. 546; *Hopkins v. Rush River*, 70 Wis. 10; *West v. Wells*, 54 Wis. 525.

The court instructed the jury, in substance, that in this class of cases the general rule, that the burden of proof is on the party alleging fraud to establish it by a preponderance of evidence, does not apply; but on the contrary the burden of proof is on the party charged with fraud and undue influence to disprove it. That was not strictly accurate, though it must be conceded there are many cases that would seem to support it, to one not thoroughly conversant with the doctrine upon which they rest. The true rule is that in this class of cases, the same as in others, the burden of proof is on the party alleging fraud to establish it by a preponderance of the evidence to the satisfaction of the jury; but proof of circumstances which, in law, satisfactorily suggest fraud does the work, and then the burden of proof is upon the party against whom fraud is alleged to meet the *prima facie* case thus made by affirmatively and satisfactorily explaining such circumstances and establishing his innocence. The facts from which fraud and undue influence are *prima facie* inferable are mentioned in numerous cases in this court, the following being among the most significant: *Smith v. Smith*, 60 Wis. 329; *Davis v. Dean*, 66 Wis. 100; *Cole v. Getzinger*, 96 Wis. 559; *Disch v. Timm*, 101 Wis. 179; *Doyle v. Welch*, 100 Wis. 24.

In *Davis v. Dean*, this language was used: "If the burden of proof is upon the plaintiffs to show such fraud or undue influence, probably we could not disturb the findings of the circuit court which negative their existence. But *under the circumstances of this case the burden of proof is not*

upon the plaintiffs." The significance of the language, "under the circumstances of this case," is liable to be overlooked, as it undoubtedly was by the learned circuit judge. In connection with that part of the opinion in *Davis v. Dean*, just quoted, is a statement of the circumstances mentioned which it was said presumptively made the case for the plaintiffs and placed the defendant in the position indicated in the quoted language. In *Disch v. Timm*, the present chief justice, quoting with approval from a late New York case, said: "When opportunity and a disposition to influence the act of another improperly are shown, a presumption of undue influence arises, and the burden of proof is *then on the party charged therewith to show that such other acted intelligently and voluntarily.*" To the same effect the court, by Mr. Justice WINSLOW, in *Doyle v. Welch*, said: "*When a voluntary conveyance is made by an aged person of his entire property without consideration, to one who stands in a position of trust and confidence to him, under circumstances of secrecy*, the burden of proof is upon the grantee to show that the conveyance was untainted with undue influence."

Such is the effect of all the authorities on the subject. The field for the operation of undue influence or fraud being shown, together with satisfactory indications that the operation has taken place, then from that situation springs the presumption of fact which the person charged with the wrong doing must meet and overcome by showing affirmatively that there was no wrong. A presumption against the person charged does not exist from the mere fact that there is such a charge, but because of circumstances appearing which satisfactorily suggest the wrong, and it is not till such circumstances appear that it can properly be said the burden of proof to disprove wrong is on the person charged.

A jury may properly be told, in such an action, that the burden to establish fraud or undue influence is upon the plaintiff, but that it need not be, and usually is not, estab-

lished by direct evidence, but by inference from circumstances pointing that way, which circumstances must be affirmatively established as part of plaintiff's case. Their attention may be properly called to the circumstances which in law raise the presumption of fraud and undue influence, and if such circumstances appear uncontroverted by the evidence, they may, and should, be told that the plaintiff's case is thereby *prima facie* established. If the circumstances are controverted, the jury should be told that they must find the facts in that regard from the evidence, the burden of proof to satisfy them by a preponderence of evidence being upon the party charged. The facts being uncontroverted, or found by the jury from the evidence, *prima facie* showing fraud or undue influence as a matter of law, the jury should be told to find against the party charged therewith unless satisfied from the whole evidence in the case that the act called in question was the free, voluntary, and deliberate act of the alleged defrauded party, the burden of proof being upon such party.

For the several errors indicated, the judgment must be reversed and the cause remanded for a new trial.

By the Court.— So ordered.

BARDEEN, J., took no part.

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DAVID ADLER & SONS CLOTHING COMPANY, Appellant, vs. THORP, Assignee, Respondent.

January 16 — January 31, 1899.

(1) *Voluntary assignment: Evidence: Examination of assignor.* (2) *Replevin: Evidence of value.* (3) *Sale of chattels: Rescission.*

1. In an action of replevin against an assignee, to which the assignor is not a party, the latter is a competent witness, and it is not error to exclude his examination, taken under sec. 1702*b*, S. & B. Ann. Stats.

(sec. 1693b, Stats. 1898), when offered, not by way of impeachment, but as substantive evidence.

2. In replevin by the vendor of goods their value was alleged, both in the complaint and answer, to be a certain sum. Plaintiff's agent who had identified the goods testified that said sum was the invoice price and that that was their value. *Held*, that the court, in directing a verdict, properly fixed their value at that amount, although the same witness further testified that the goods had depreciated in value forty per cent. during the twenty-two days which had elapsed since their sale, because they had been unpacked and placed on shelves and some suits and sizes sold. *Jenkins v. Steanka*, 19 Wis. 126, distinguished.

3. A vendor of merchandise cannot rescind the sale and reclaim the goods merely because the purchasers, knowing themselves to be insolvent, did not disclose that fact, where no inquiries and no false statements were made and no artifice resorted to to mislead the vendor, and it does not appear that the goods were bought with the fraudulent intent of not paying for them.

APPEAL from a judgment of the circuit court for Door county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Felker, Doe & Felker* and *Charles L. Aarons*, and oral argument by *Charles W. Felker.*

For the respondent there was a brief by *Greene, Vroman, Fairchild, North & Parker*, and oral argument by *Charles E. Vroman.*

CASSODAY, C. J. This is an action of replevin of certain goods and merchandise sold by the plaintiff's salesman to the firm of L. D. Thorp & Son, of Egg Harbor, April 26, 1896, and shipped to them by the plaintiff on the next day. May 15, 1896, that firm made a voluntary assignment to the defendant for the benefit of their creditors. May 19, 1896, the plaintiff replevied the goods. At the close of the trial the court directed a verdict in favor of the defendant, to the effect that he was the owner and entitled to the possession of the property described, that the value thereof was $634,

and that the defendant's damage for withholding the property was six cents. From the judgment entered thereon accordingly, with costs, the plaintiff brings this appeal.

1. Error is assigned because the court excluded the testimony of one of the assignors, taken before a county judge, under sec. 1702*b*, S. & B. Ann. Stats., being sec. 1693*b*, Stats. 1898. As indicated by the late revisers in their note to that section, "it was intended to aid the parties in an assignment to obtain evidence to be used on the final hearing or perhaps before such hearing." Id.; *In re Baker*, 72 Wis. 395. Such assignor is not a party to this action, but was a competent witness, and appears to have been sworn and examined as such on behalf of the plaintiff on the trial. Such testimony was not offered by way of impeachment, but as substantive evidence. There was no error in excluding such testimony.

2. Error is assigned because in directing a verdict the court fixed the value of the property at $634. That is the value of such property as alleged in the complaint, and also as expressly alleged in the answer. The plaintiff's witness, in its employ, who picked out the goods invoiced and sold to the firm, testified to the effect that he went to Egg Harbor to identify the goods so sold by the plaintiff; that he found the goods in the possession of the defendant, as such assignee; that he "identified *some* of the goods;" and that "the list attached to the complaint," which he held in his hand, was correct; and that the invoice price of the goods so identified was $634, and that their value was $634. These facts clearly distinguish the case at bar from *Jenkins v. Steanka*, 19 Wis. 126, particularly relied upon by counsel for the plaintiff. In that case, which was replevin, the trial court refused to allow the plaintiff to prove that the property detained was of less value than alleged in the complaint and not denied in the answer; and such ruling was held to be error. Here the plaintiff was allowed to prove, and did prove, that the value

was the same as alleged in both the complaint and answer. True, the same witness testified that the market value of those goods was about sixty cents on the dollar; that the goods had depreciated in value forty per cent. on account of broken lots, and lots which were sold out, and odd sizes which the plaintiff no longer had in stock. But the only ground or reason given for such depreciation during the twenty-two intervening days is that the clothing was unpacked in the store at Egg Harbor, and put on the shelves, and some suits and sizes sold out. This is insufficient to reduce what he himself had sworn to be the value, and what the complaint and answer both allege to have been the value.

3. Error is assigned because the court directed a verdict in favor of the defendant upon the merits. The contention is that the evidence is sufficient to have authorized the jury to infer that the firm bought the goods with the fraudulent intent of not paying for them, or, at least, that the firm failed to reveal facts to the plaintiff which would have prevented it from shipping the goods. The principal fact relied upon is that at the time of ordering the goods the firm was insolvent; and that that fact, and other circumstances, such as heavy indebtedness, poor trade, poor collections, general financial depresion, and the like, if communicated to the plaintiff by the firm, would have prevented the plaintiff from shipping the goods. The goods were ordered by the firm from the plaintiff's traveling salesman, Seligman, who solicited and urged the firm to make the purchase. Seligman was not sworn. It appears, however, that he called on the firm at their store, and solicited the order in the ordinary way and in the usual course of business, and the amount of the purchase was the usual amount for that season of the year; that he asked no questions as to the firm's financial condition, and that no statement or representation was made to him respecting such condition; that no more goods were purchased than were needed by the

firm for the continuance of the business; that the business did continue in the usual manner down to the time of the assignment; that during that time the proceeds of sales and collections were applied to the payment of the debts of the firm; that during the two weeks immediately prior to the assignment the firm paid some $400 on their debts; that no misappropriation was made for the benefit of the firm or their friends; that no preference was given or secured; that the stock and liabilities of the firm were substantially the same as in the spring of 1895; that the store had been run for years largely on credit; that at the time of purchasing the goods in question the firm expected to make a loan sufficient to pay up their liabilities, and secure the same on exempt property; that the failure to make the loan did not transpire until about the time of the assignment; that in May, 1896, after the firm had received the goods in question and placed them upon the shelves, and before making the assignment, certain creditors of the firm threatened attachments and legal proceedings, by which the firm was induced to make the assignment. No question is made as to the regularity or validity of the assignment. We assume, for the purposes of this case, that at the time of purchasing the goods the firm was insolvent and unable to pay their debts out of their nonexempt property, and that the members of the firm, or some of them, had reasonable ground for believing that such was their condition. The question recurs whether such facts were sufficient, in law, to authorize the plaintiff to rescind the sale and reclaim the goods.

This court has held, in effect, that where a person orders goods, knowing himself to be insolvent, without disclosing his insolvency, and with the preconceived purpose of not paying for them, the purchase is fraudulent, and the vendor, upon discovering the fraud, may rescind the contract and retake the goods, as against the vendee. *Lee v. Simmons*, 65 Wis. 526. The cases cited in support of such ruling concede

the law applicable to this case. Thus, in *Nichols v. Pinner*, 18 N. Y. 295, there cited, it was expressly held that: "The mere omission of a purchaser of goods to disclose his insolvency to the vendor is not a fraud for which the sale may be avoided. When no inquiries are made of the vendee on the subject, and he makes no false statements, nor resorts to any artifice to mislead the vendor, it is not, in general, fraudulent in him to remain silent in respect to his pecuniary condition. An honest, though abortive, purpose to continue business and pay for the goods is consistent with the vendee's knowledge of his own insolvency; and the purchase is not fraudulent when made with such intent, though founded in delusion and unreasonable expectations." Such ruling has never been altered nor shaken in New York. *Morris v. Talcott*, 96 N. Y. 107; *Rothmiller v. Stein*, 143 N. Y. 594. The same rule maintains in other states. *Morrill v. Blackman*, 42 Conn. 324; *Illinois Leather Co. v. Flynn*, 108 Mich. 91; *People ex rel. Ellis v. Healy*, 128 Ill. 9, 17. The principles of law thus quoted from 18 N. Y. were expressly sanctioned by this court in *Garbutt v. Bank of Prairie du Chien*, 22 Wis. 384, 392; and the same is conceded in *Lee v. Simmons*, *supra*, and expressly sanctioned in *Burchinell v. Hirsh*, 5 Colo. App. 500. The difficulty with the case at bar is that the plaintiff has failed to prove facts and circumstances sufficient, when viewed in the most favorable light for the plaintiff, to authorize a jury to find that the firm purchased the goods by any misrepresentation or artifice, or with any preconceived purpose of not paying for them.

We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

BARDEEN, J., took no part.

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VOROUS and others, Respondents, vs. THE PHENIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, Appellant.

January 16 — January 31, 1899.

Fire insurance: Certificate of magistrate: Amendment and repeal of statutes.

Under ch. 195, Laws of 1891, the insurance commissioner prescribed a form for fire insurance policies, to be known as the Wisconsin standard policy, in which was a clause requiring the insured, in case of loss, to furnish a certificate of the magistrate or notary public (not interested in the claim, etc.) living nearest the place of the fire. Ch. 124, Laws of 1893, provided that whenever a certificate of a magistrate or notary should be required under a policy it should be a sufficient compliance on the part of the assured to furnish a certificate of any magistrate or notary residing in the county, not interested, etc. Afterwards, the act of 1891 having been held invalid, the legislature by ch. 387, Laws of 1895, prescribed as the Wisconsin standard policy the form previously prescribed by the insurance commissioner. The act of 1895 repealed all acts conflicting therewith, but did not undertake to revise the law on the subject of insurance. *Held*, that the act of 1893 was not repealed or modified, and that, notwithstanding the standard policy required a certificate from the nearest magistrate or notary, a certificate from any magistrate or notary in the county was sufficient.

APPEAL from a judgment of the circuit court for Door county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Mylrea, Marchetti & Bird*, and oral argument by *W. H. Mylrea.* They argued, among other things, that the provision in the policy as to a certificate was valid and binding. *Cayon v. Dwelling House Ins. Co.* 68 Wis. 510; *Killips v. Putnam F. Ins. Co.* 28 Wis. 472; *Badger v. Glens Falls Ins. Co.* 49 Wis. 389; *Wright v. Hartford F. Ins. Co.* 36 Wis. 522. The standard fire policy established by ch. 387, Laws of 1895, makes the condition as to such a certificate essential, and by implication repeals ch. 124, Laws of 1893. *State v. Campbell*, 44

Wis. 529. The court cannot avoid the plain requirement of the statute by construction. *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258.

H. O. Fairchild, of counsel, for the respondents.

CASSODAY, C. J. This is an action on a policy of insurance issued by the defendant to the plaintiff *Vorous*, April 20, 1897, wherein and whereby it agreed to insure him to the amount of $750, for the term of one year, against all direct loss or damage by fire, to wit, $600 on the one-story frame building occupied by him as a general store and situate on the premises described, and $150 on counters, shelving, and safe while therein. It was therein stipulated and agreed that the loss, if any, on the building, should be payable to Joannes Bros., mortgagees, as their interest might appear. The members of that firm are plaintiffs in this action. On July 7, 1897, the building and counters and shelving were burned and totally destroyed by fire, and the safe was also injured to the extent of $20. The complaint is in the usual form in such cases. The defendant answered by way of admissions and denials and counter allegations, and, among others, one to the effect that the plaintiff *Vorous* had failed to furnish a certificate of the magistrate or notary living nearest the place of the fire, as required by the defendant and the policy.

The cause was tried by the court, and at the close of the trial it was found, as matters of fact, in effect, that all the allegations of the complaint were true, and that the plaintiff had performed all the conditions of the policy, except that *Vorous* had failed to furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of the fire, stating that he had examined the circumstances, and believed the insured had honestly sustained loss to the amount to be certified by such magistrate or notary public; that, in due time after the fire, the defendant

duly demanded of *Vorous* that he furnish the certificate; that the magistrate or notary public living nearest the place of such fire was one Samuel Churches, who resided and had his office about eighty rods from the place of the fire; that the magistrate or notary public next nearest the place of fire was one Goodletson, who resided and had his office in the county about four miles from the place of the fire; that, upon such demand being made on the plaintiff *Vorous*, he took immediate steps to procure such certificate of said Churches, and for that purpose called upon Churches, and requested him to make such certificate; that Churches, having heard some rumors reflecting upon the honesty of the loss, and having no personal knowledge of the extent or honesty of the same, and then being, as the fact is found, a bitter enemy of the plaintiff *Vorous*, and unwilling, by reason thereof, to do anything which would benefit or be an accommodation to him, or to make any investigation of the facts concerning the loss to ascertain the truth thereof, arbitrarily and unjustly refused to make or give his certificate or to do anything in the premises; that Churches then and there assigned, as his only reason for such refusal, the enmity and ill will aforesaid, and his unwillingness to do aught to accommodate or benefit *Vorous*, and intended to and did induce the belief in the minds of *Vorous* and his attorney that such was his only reason for his refusal; that, reasonably relying on such belief, this suit was brought; that Churches assigned no other reason than as aforesaid for his refusal until he became a witness in this action, and testified that, had he known that the loss was an honest loss, he would not have made such refusal; that the plaintiff *Vorous* used due diligence to procure from Churches his certificate, and, without fault on his part, failed to procure the same or to furnish it to the defendant; that the plaintiff *Vorous*, having, without his fault, failed to procure or furnish the certificate of Churches, procured in due season and due form the

certificate of Goodletson, and delivered it to the defendant; that neither Churches nor Goodletson was a relative or creditor of the plaintiff *Vorous*, nor was he interested in any part of the recovery under the policy; that the certificate of Churches was not waived by the defendant in any manner (except as the facts so found constitute such a waiver); that the plaintiff *Vorous*, by reason of such fire, suffered loss and damage under such policy in the sum of $750; that the loss and damage, by the terms of the policy, became and were due and payable September 29, 1897, but no part thereof has ever been paid.

As conclusions of law, the court found that the plaintiff *Vorous* was excused from procuring and delivering to the defendant the certificate of Churches; that the production and delivery to the defendant of the certificate of Goodletson was a sufficient compliance with the conditions of the policy; that the plaintiffs were entitled to recover from the defendant $750, with interest from September 29, 1897, together with their costs of suit; and ordered judgment accordingly.

From the judgment so entered thereon the defendant brings this appeal.

The only defense claimed by the defendant is the failure of the plaintiffs to obtain the certificate of Churches. In 1891 the legislature passed an act entitled "An act to provide for a uniform policy of fire insurance," etc. Laws of 1891, ch. 195. The first section of the act required the insurance commissioner to prepare and file in his office, on or before September 1, 1891, a printed form, in blank, of a contract or policy of fire insurance, together with such provisions, agreements, or conditions as might be indorsed thereon or added thereto and form a part of such contract or policy; and such form, when so filed, should be known and designated as the "Wisconsin standard policy," and to be as near as the same could be made applicable to the type and form

of the "New York standard fire insurance policy." Such form of policy was prepared and filed by the insurance commissioner within the time required. The form of policy so prepared and filed by the commissioner required "a certificate of the magistrate or notary public . . . living nearest the place of the fire," etc., as subsequently required by ch. 387, Laws of 1895 (p. 783). In 1893 an act was passed by the legislature entitled "An act relating to fire insurance policies," and provided that "whenever any fire insurance company under any of the provisions of its policy shall require the assured, in case of loss or damage by fire, to furnish a certificate or statement of a magistrate or notary public it shall be a sufficient compliance on the part of the assured to furnish a certificate or statement of any magistrate or notary public residing in the county where the fire occurs who shall not be interested in the claim or related to the assured." Laws of 1893, ch. 124. The manifest purpose of that act was to provide that such certificate or statement of a magistrate or notary public residing in the county where the fire occurred should be a sufficient compliance with what was then generally supposed to be the valid standard policy of 1891, or any other policy. In December, 1893, this court assumed that the form of policy so prepared and filed by the insurance commissioner was a valid law. *Bourgeois v. N. W. Nat. Ins. Co.* 86 Wis. 606. But subsequently a question arose as to the validity of the form of policy so prepared and filed by the insurance commissioner in 1891, and finally it was held to be invalid by this court, on the ground that the legislature could not, under the constitution, delegate to such commissioner the power to prescribe such form of policy, which power is vested exclusively in the legislature. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63. To obviate such objection to the validity of ch. 195, Laws of 1891, the legislature, in 1895, passed an act entitled "An act to provide for a uniform policy of fire insurance to be known as

the Wisconsin standard fire insurance policy," etc., wherein and whereby the legislature itself prescribed a *form of policy*. That act made no change in the form prepared and filed by the insurance commissioner in 1891, but simply gave vitality and force to such form by direct action of the legislature, and thus continued the same in force. True, that act provides that all acts and parts of acts conflicting therewith were thereby repealed. Laws of 1895, ch. 387, sec. 5. But it is to be remembered that the act does not undertake to revise the law on the subject of insurance, but merely to prescribe one form of policy, which is to be uniform, and all other forms of fire insurance policies, with certain exceptions, are thereby forbidden. Sec. 3. We are constrained to hold that it did not repeal, alter, or modify ch. 124, Laws of 1893. We must regard that chapter, therefore, as still in force. Under that chapter, the certificate in question was sufficient. This is in harmony with the ruling of the trial court.

By the Court.— The judgment of the circuit court is affirmed.

BARDEEN, J., took no part.

WORACHEK, Respondent, vs. THE NEW DENMARK MUTUAL HOME FIRE INSURANCE COMPANY, Appellant.

January 16 — January 31, 1899.

(1) *Fire insurance: Waiver of condition: Knowledge of existing facts.*
(2) *Instructions to jury: Special verdict.*

1. The knowledge or information on the part of the insurer, at the time of issuing a policy, which will operate as a waiver of a condition therein must be knowledge of an existing fact or condition of things, and not a mere statement by the insured of an intention to do some act in the future contrary to such condition of the pol-

icy. Thus, the fact that the agent of a township mutual fire insurance company, at the time he wrote a policy covering household goods, saw a portable engine near the house, and was informed by the insured that it was intended for use in the future where it stood, did not constitute a waiver of a provision in the policy against the insurance of property located within 200 feet of any steam power, at least unless the engine was apparently permanently located in its position and so attached or capable of attachment to machinery that it would be apparent to the agent that it was customarily used in that place.

2. An instruction which states to the jury what will be the effect of their answer to a question submitted for special verdict is objectionable. [Whether such an instruction would of itself work a reversal in this case, not determined.]

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

This is an action to recover upon a policy of insurance for the loss of household furniture and wearing apparel of the plaintiff, which were destroyed by fire March 9, 1897. The issuance of the policy was not denied, nor was the fact that a fire occurred by which some damage was done to the property; but it was claimed by the defendant that one of the conditions of the policy had been broken by the plaintiff, and that she had been guilty of false and fraudulent swearing in making her proofs of loss as to the value of the property destroyed.

The action was tried by jury, and it appeared upon the trial that the defendant is a mutual town insurance company, organized under the laws of this state; that the plaintiff applied for and received the policy of insurance from the defendant on the 22d of July, 1896, covering her household furniture and wearing apparel, in the sum of $150, which were then situated in the dwelling house of one George Worachek, which policy ran for five years from its issuance; that the property was damaged by fire on the 12th of March, 1897; that the policy contained the following provision: "No property of steam machinery or manufactories wherein

steam is employed shall be insured in this company. And no property shall be insured in this company unless such property is two hundred (200) feet apart from any steam power and any railroad track, except horses and other live stock in case if killed or damaged by lightning at the premises of the assured." It further appeared that Joseph Worachek, the plaintiff's husband, acted as the agent of the plaintiff in procuring the insurance, and that one Markinson was the agent of the company who examined the premises and took the application for the insurance; that, at the time the application was made to Markinson, there was standing upon the premises, and within 200 feet of the dwelling house, a portable steam engine; and that in the barn upon the premises, which was also within 200 feet of the dwelling house, there was a feed mill. The testimony does not clearly show whether the engine was connected with the mill by a belt at the time the application was made, but it is admitted by all parties that there was conversation about the engine and the feed mill at the time. The plaintiff's husband claims that he showed the agent both the engine and the feed mill, and told him that they ground feed with them right along in the fall of the year, and sometimes in the summer; and he also testified that he and his son George ground feed and cut straw with the engine all around among the neighbors, and, in threshing time, threshed with the engine.

There was testimony tending to show that the engine generally stood in about the same place in the barn yard in front of the barn, and that the belt was generally taken off when the feed mill was not in operation, and that there was nothing about the position of the engine when it was not operating that would cause a passer-by to know that there was a mill operated by it. Markinson testified that he saw the steam engine standing in the yard, not in a position to be attached; that he went in the barn, and saw the mill in the barn; that Joseph Worachek told him that he went around and ground feed and cut straw for the neighbors,

but did not say that he used it at his place there for that purpose, but that he did say that he was going to use it there; that he (Markinson) told him that the company would not allow that, and would cancel the policy if he ran that feed mill there, and that he would have to put it off 200 feet from the building; that Worachek then said he would not put it there. There was other proof tending to substantiate Worachek's statement as to what he told the agent.

A special verdict was demanded, and was rendered, as follows: "(1) Did the agent who took the application for the policy in question know at the time he took such application that the plaintiff had used and intended to continue using a steam engine within two hundred (200) feet of the insured property? *A.* Yes. (2) Did the defendant's agent inform the plaintiff that defendant would not allow the plaintiff to use a steam engine within two hundred (200) feet of the insured property? *A.* No. (3) Did the plaintiff knowingly make any misrepresentations or false statements in her proof of loss or examination before the officers of the company in relation to the value, quantity, quality, or description of any personal property destroyed or damaged by the fire in question? *A.* No. (4) What was the value of the personal property belonging to the plaintiff which was destroyed by the fire in question? *A.* $125."

The plaintiff remitted the sum of $5 from the amount of the verdict, and judgment was rendered for the plaintiff thereon, with costs, and the defendant appeals.

For the appellant there was a brief by *Feeney & Atwood*, and oral argument by *G. T. Atwood.*

For the respondent there was a brief by *Greene, Vroman, Fairchild, North & Parker*, and oral argument by *Charles E. Vroman.*

WINSLOW, J. The policy in question here is not a standard policy, but was issued by a township mutual insurance company, and hence the provisions of law which govern the

standard policy do not apply to the present case. Stats. 1898, sec. 1941—64.

1. The first question of the special verdict asks the jury whether the soliciting agent knew when he took the application that the plaintiff had used, and intended to continue using, a steam engine within 200 feet of the insured property. In submitting the question, the court charged the jury as follows: "Now, the only testimony bearing upon that is that of the agent and of the plaintiff's husband who was present at the time this application was made. They both agree that Mr. Worachek, the plaintiff's husband, told the agent that he had used that machinery there, and that it was his intention and purpose, or of the owners of the property, to continue using it. I think, so far as that question is concerned, there really can be no controversy." This charge was certainly erroneous where it says that the insurance agent and the plaintiff's husband both agree that the plaintiff's husband told the agent that he had used the machinery there, because the evidence of the two witnesses named is directly in conflict on this proposition. They do agree, in substance, that plaintiff's husband told the agent that they intended to use it in the future, but this is the extent to which they agree. So, here, manifestly, is an incorrect statement of fact in the charge. It was duly excepted to, and, if it relates to a material question in the case, then it must constitute prejudicial error.

The purpose of the proof upon the subject of the agent's knowledge of the engine and its location within 200 feet of the house was evidently to bring the case within the rule that if an insurer, with full knowledge of the existence of a fact or a condition of things which is contrary to some provision of the policy, nevertheless executes and delivers the policy, he will be held to have waived the condition, or estopped from asserting it. *Schultz v. Caledonia Ins. Co.* 94 Wis. 42; *Johnston v. N. W. L. S. Ins. Co.* 94 Wis.

117–121, and cases cited. This rule has been most frequently applied in cases where the agent was informed of incumbrances, or that the title was not absolute; but there is no good reason for holding that it would not be equally applicable in a case where he knew when he took the application that steam machinery or inflammable articles were customarily used in or about a building, in violation of a condition of the policy. *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202; *Wright v. Hartford F. Ins. Co.* 36 Wis. 522. But it is almost universally held that the knowledge or information which will thus operate must be knowledge of an existing fact or condition of things, and not a mere statement by the insured of an intention to do some act in the future contrary to the conditions of the policy. Ostrander, Fire Ins. § 350. Such latter statement may or may not be carried out, and it manifestly stands on a different basis from a fact or condition existing to the knowledge of the insurer when the policy was issued.

Applying these principles to the present case, it will be readily seen that it was not sufficient to create an estoppel or waiver of the condition against steam machinery that the agent saw a portable engine in the farmyard. Such sights are frequent and do not necessarily mean that it has been or is to be used where it stands. Nor was it sufficient for the insured to state that he intended to use the engine at some time in that place. This latter would be but a mere statement of future intention, and not information of an existing fact or condition. So, it is clear that a judgment for the plaintiff cannot stand upon the mere finding that Worachek told the agent that they intended to use the engine where it stood, at some time in the future. It may well be that if the engine was apparently permanently located in its position and so attached or capable of attachment to the feed mill that it would be apparent to the agent that it was customarily used in that place, and so had become really a

condition in which the premises had been and were expected and intended to remain for a considerable part of the time (especially if the agent were also informed of such facts by the parties), such facts would constitute knowledge of a fact, within the meaning of the law, which would estop the insurance company from setting up the condition against the use of steam machinery. Such facts do not appear in the verdict in this case, nor can we say that the evidence conclusively establishes them.

2. The circuit judge charged the jury with regard to the third question of the special verdict, as follows: "Both the terms of the contract policy in question and the law require that in case of loss there should be entire honest dealing between the parties, and that the party who has sustained a loss shall not knowingly make any misrepresentation or false statement relative to the loss, in the proof of loss or in any examination which they may be submitted to by the company; and in this case it appears there was such an examination, and, if the parties did knowingly make any such misrepresentations or statement, it is part of their contract between them, as well as the law of the land, that it shall forfeit all rights under the policy." To the latter part of this instruction, exception is taken, because it states to the jury what the effect of their answer will be upon the plaintiff's right to recover. There is ground for the objection, and doubtless the instruction will not be repeated upon another trial, but, as the case must be reversed upon the first ground stated, it does not become necessary to decide whether this point alone would necessitate reversal.

By the Court.—Judgment reversed, and action remanded for a new trial.

BARDEEN, J., took no part.

102 88
112 [1]143
112 [2]228

WORACHEK, Respondent, vs. THE NEW DENMARK MUTUAL HOME FIRE INSURANCE COMPANY, Appellant.

January 16 — January 31, 1899.

Fire insurance: Indivisible contract: Forfeiture of entire claim by false swearing as to part.

1. A policy of insurance on a building and contents, the premium being distributed part to each species of property, is a single, indivisible contract, and under a general forfeiture clause in the policy, if one part of the risk be affected, the entire risk is affected. What bars a remedy on the policy as to one part of the property, bars the remedy as to all.
2. If a policy of insurance cover a building and contents, and the entire property be destroyed by fire, and the policy contain a clause forfeiting all claims thereunder and barring all remedies thereon in case of any false swearing in regard to the loss, and there be such false swearing, which does, or is liable to, prejudice the insurance company as to any part of the property destroyed, the effect is to forfeit the entire loss.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

Action to recover on a fire insurance policy. The subject of the insurance was a dwelling house and the ordinary personal property of the occupant. The complaint stated facts requisite to a recovery. The answer, among other things, claimed a forfeiture of all liability on the contract of insurance because of acts of the assured and a clause of the policy which reads as follows: "Any misrepresentation or fraud or concealment or false swearing, by the insured, in relation to any insurance, or the cause of any loss or damage to any insured property, or the quality, quantity, description or value of any property destroyed or damaged by fire, shall forfeit all claim by virtue of the policy and be a full bar to all remedies upon the same." It was alleged that the assured knowingly made a false statement under oath

as to the amount of personal property destroyed by the fire, with intent to defraud the insurance company. The jury found in defendant's favor on that point. As to the actual loss there was no dispute on the evidence. The loss on the building was total. A motion was made for judgment in defendant's favor and denied. Judgment was rendered for plaintiff for the loss on the house, but denied as to the loss on the personal property. Defendant appealed.

For the appellant there was a brief by *Feeney & Atwood*, and oral argument by *G. T. Atwood*. They argued, among other things, that fraudulent representations as to the value or quality of personal property in a policy also covering real property will work a forfeiture as to the whole policy and defeat the right of the insured to recover anything upon the real property included in such policy, though the loss of real property be total. *Oshkosh P. & P. Co. v. Mercantile Ins. Co.* 31 Fed. Rep. 200; *Moore v. Virginia F. & M. Ins. Co.* 28 Grat. 508, 26 Am. Rep. 373.

For the respondent there was a brief by *Greene, Vroman, Fairchild, North & Parker*, and oral argument by *Charles E. Vroman*. They contended, *inter alia*, that the operation of the valued policy law in this state makes the contract divisible. Stats. 1898, sec. 1943; *Reilly v. Franklin Ins. Co.* 43 Wis. 449. Under this statute it has been uniformly held that false swearing concerning the amount of the loss will not defeat the right of the assured to recover the face of the policy, where the building is totally destroyed, since the amount of the loss is conclusively fixed by the statute. *Cayon v. D. H. Ins. Co.* 68 Wis. 510, 515; *Bammessel v. Brewers' F. Ins. Co.* 43 Wis. 463. If fraudulent statements concerning the value of the *building itself* will not avoid the insurance on the building, how can fraudulent statements as to *something else* invalidate it? To constitute a fraud appreciable in law the false statement or fraud must be material and must operate injuriously to the party complaining.

McDonald v. Daniels, 58 Wis. 426; *Castleman v. Griffin*, 13 Wis. 535; *Barber v. Kilbourn*, 16 Wis. 485; *Foster v. Taggart*, 54 Wis. 391. In the instant case the fraud charged is not material to the loss on the building, nor did it cause any loss or damage to the defendant company. It occurred *after the fire* and *after the liability of the defendant for the insurance on the building had become fixed and absolute.* Such fraud is no more material or actionable than is the fraud involved in a conveyance of exempt property with intent to defraud creditors. The reason of the rule is the same in both cases. *Torrey C. Co. v. Eul*, 95 Wis. 615; *Rozek v. Redzinski*, 87 Wis. 525; *Bank of Commerce v. Fowler*, 93 Wis. 241; *Shawano Bank v. Koeppen*, 78 Wis. 533; *Allen v. Perry*, 56 Wis. 178; *Hibben v. Soyer*, 33 Wis. 319.

MARSHALL, J. The sole question for decision on this appeal is, Where a policy of insurance against loss by fire covers a building and personal property located therein, the premium being distributed part to the realty and part to the personalty, and the building is totally destroyed by fire and the personal property injured or destroyed as well, and the policy provides that any false swearing by the insured in relation to the quantity, quality, description, or value of the property destroyed or damaged shall forfeit all claim under such policy and bar all remedies thereon, and there is such false swearing as to the personalty, can the assured nevertheless recover as to the realty? The learned trial court decided that in the affirmative on the strength, evidently, of *Loomis v. Rockford Ins. Co.* 77 Wis. 87. There the court held that a change in the title to one of several buildings, covered by an insurance policy, such buildings being situated some distance from each other, does not render the policy void as to the other buildings because of a clause in the policy to the effect that any change of the title to the insured property without consent of the company shall render the

policy void. Following decisions elsewhere, and construing the language of the policy strictly against the insurance company, a conclusion was satisfactorily reached that it was within the reasonable meaning of the language of the policy to say that the contract of insurance was divisible according to the distinct risks covered by it. The court, however, did not go so far as to hold that a building and its contents could be considered distinct risks. On the contrary, the decision was expressly limited to cases where the property insured is so located that the risks assumed are separate and distinct, the situation being such that the destruction of one portion of the property will not be liable to injure or destroy the other. The previous decisions of this court, *Hinman v. Hartford F. Ins. Co.* 36 Wis. 159, and *Schumitsch v. Am. Ins. Co.* 48 Wis. 26, to the effect that insurance on a building and its contents is indivisible, were expressly approved. The subject was again referred to in *Burr v. German Ins. Co.* 84 Wis. 76, and again in *Carey v. German Am. Ins. Co.* 84 Wis. 80, the court saying that insurance on a building and contents, with the risk distributed to the different species of property, is a single indivisible contract, and, under a general forfeiture clause, a circumstance barring a recovery for a loss on part of the property will bar a recovery for any. These decisions are decisive of the question raised here, and are in accordance with numerous authorities elsewhere, none of which need be referred to, as the cases in our own court are amply clear and all one way.

The fact that false swearing as to a building totally destroyed is not prejudicial to the insurance company, and so does not work a forfeiture under the rule stated in *F. Dohmen Co. v. Manufacturers' & B. F. Ins. Co.* 96 Wis. 57, to the effect that false swearing must be such as will be liable to work an injury to the insurance company, in order to make the contract for forfeiture operative, does not apply here. It is not necessary that injury by false swearing act-

ually take place. It is sufficient if there be false swearing to the actual prejudice of the insurance company, or which is liable to work that way. The contract of insurance being single, if any part of it is such that false swearing in reference to it would be liable to injure the company, and there be such, according to the plain language of the contract under consideration all claims by virtue of it are forfeited and all remedies upon it barred. The court cannot, by judicial construction, work any exception into such plain language.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment for the defendant.

BARDEEN, J., took no part.

NAUMAN, Respondent, vs. ULLMAN, Appellant.

102 92
110 *481

January 17—January 31, 1899.

Sale of chattels: Warranty: Waiver: Parol evidence: Special verdict.

1. One buying an article upon an express warranty may sue for any damages resulting from a breach without returning or offering to return such article.
2. Plaintiff bought a horse from the defendant upon an express warranty that it was well and sound except for a cold, and, paying part of the price, gave a three-days note for the balance, which provided that the ownership and possession should not pass from the vendor until the note was paid. Plaintiff received the horse, and paid the note when due, but without knowledge that the disease of the horse was other than a cold, and after its death brought suit upon the express warranty. *Held*, that there had been no waiver of the warranty.
3. The signing of such note was not a reduction of the contract to writing, which would render parol evidence of the warranty inadmissible, since the note did not in terms purport to state the whole contract but was merely a document in execution of a part thereof.

4. A question for a special verdict, "Did the defendant sell and the plaintiff buy said horse for a sick horse, the plaintiff taking his chance?" was not objectionable as being compound, it being conceded that plaintiff purchased the horse knowing it was sick but supposing it to be sick only with a cold, and the material part of the question being merely whether or not he agreed to assume the risk of such sickness as the horse might have.

APPEAL from a judgment of the circuit court for Door county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

The plaintiff purchased from the defendant a horse for $90, which was warranted to be well and sound except for a cold. On the completion of the negotiation, plaintiff paid $40 down, and, having left at home a certificate of deposit for $50, was unable to pay the balance then, whereupon a note was prepared by the defendant and signed by the plaintiff for $50, payable three days afterwards, providing that the sale of the horse was upon condition that ownership and possession should not pass from the defendant until the note was paid, and that the defendant had power to declare the note due, take possession of the horse, and sell the same at public or private sale, upon five days' notice, at any time he might deem himself insecure. Thereupon the plaintiff took the horse to his home, at Egg Harbor, about twenty miles from Sturgeon Bay, the place of purchase. The following day (Sunday) she was worse, and on Monday and Tuesday a neighbor was called in, who unsuccessfully attempted treatment, without discovering that her trouble was otherwise than a cold. Late Tuesday night a veterinary surgeon was called, and treated the horse, which, however, died on Wednesday, of a disease then found to be *puerpura hemorrhagic*, a kind of blood poisoning, which the evidence tended to show must have existed before the date of the purchase. On Tuesday, the day the note was due, the plaintiff sent his certificate of deposit to the bank at Egg Harbor, to pay the note above mentioned. Plaintiff brought suit for damages for breach of warranty.

A special verdict was taken, which found (1) the sale of the horse for $90; (2) the giving of the note; (3) that plaintiff paid said note after he ascertained that the horse was very sick, and after he called a veterinary surgeon to treat him; (4) that the defendant did not sell and the plaintiff did not buy said horse for a sick horse, the plaintiff offering to take his chance; (5) that the defendant warranted the horse to be sound and well, except that she was sick with a cold; (6) that the horse was not sound and well, except sick with a cold, at the time the warranty was made; (7) that the horse was of no value; (8) that had she been sound and well, except sick with a cold, she would have been worth $135. The first, second, third, and eighth questions were answered by the court. Defendant moved for judgment on the verdict, and also moved to set aside the verdict and for a new trial, both of which motions were overruled, and judgment entered for $135 and costs; the court holding, in the order denying the motion for judgment, that the evidence did not show that the plaintiff, while knowing the horse to be sick at the time of paying the note, had any knowledge that such sickness was other than a cold. From the judgment so entered the defendant appeals.

For the appellant there was a brief by *Eastman & Martineau*, and oral argument by *P. H. Martineau*. They argued, among other things, that the sale was a conditional sale, and the plaintiff, by accepting and paying for the horse after he knew of its sickness, waived the defect, even if covered by a warranty. *Wadleigh v. Buckingham*, 80 Wis. 230, 236; *Briggs v. McEwen*, 77 Iowa, 303; Benj. Sales, § 334; 21 Am. & Eng. Ency. of Law, 633; *Thayer v. Davis*, 75 Wis. 205–208; *C. Aultman & Co. v. Silha*, 85 Wis. 364; *W. W. Kimball Co. v. Mellon*, 80 Wis. 144; *Locke v. Williamson*, 40 Wis. 377; *Olson v. Mayer*, 56 Wis. 551; *Keller v. Oberreich*, 67 Wis. 282; *McClure v. Jefferson*, 85 Wis. 208; *Thompson v. Libby*, 36 Minn. 287; *Benson v. Monroe*, 7 Cush. 125;

Harrison v. Milwaukee, 49 Wis. 252. The note given was a formal written agreement of sale, and no oral warranty could be shown. *Milwaukee B. Co. v. Duncan*, 87 Wis. 120; *McQuaid v. Ross*, 77 Wis. 470.

Y. V. Dreutzer, for the respondent.

DODGE, J. 1. The first, second, and eighth assignments of error raise generally the question of the sufficiency of the evidence to support the verdict. The defendant contends that by the terms of the note the sale was conditional and executory; that payment of the same constituted an acceptance of the horse and a waiver of the breach of the warranty, which breach, he contends, the answer to the third question finds was then known to plaintiff.

It is unnecessary to decide whether the giving of the note in question transposed the transaction into an executory sale, so that, as defendant claims, the acceptance of the horse did not occur until the payment of the note; for, even if defendant's full contention on that point be conceded, it does not appear that plaintiff, at the time of such payment, had knowledge of the defect or unsoundness which constituted the breach of express warranty, which defect, according to all the evidence, was not patent and obvious. True, it is found by the special verdict, in answer to the third question, that plaintiff did know that the horse was very sick, but that question was put and answered by the court, and the appellant has brought up the court's own construction thereof, namely, that such knowledge was only of sickness consistent with a cold, and that neither the evidence nor said special verdict shows any knowledge of the existence of any other disease or unsoundness. We must presume, unless the contrary clearly appears, that the trial court correctly understood and construed his own acts. We also think the court was right in concluding there was not evidence to support a finding that the plaintiff knew of

any unsoundness, other than a cold, when he paid the note. In that view, there is nothing to constitute a waiver of the warranty, and the case falls clearly within the rule that one buying an article upon an express warranty may sue for any damages resulting from a breach without returning or offering to return such article. *Bonnell v. Jacobs*, 36 Wis. 59; *Morehouse v. Comstock*, 42 Wis. 630; *Warder v. Fisher*, 48 Wis. 338; *Buffalo B. W. Co. v. Phillips*, 67 Wis. 129.

2. The third and fifth assignments of error present an objection to the fourth question of the special verdict: "Did the defendant sell and the plaintiff buy said horse for a sick horse, the plaintiff taking his chance?" This is objected to as compound, and it is claimed that the first part of the question could not have been answered otherwise than "Yes." This contention is probably correct, but serves as an answer to the objection to the question; for conceding, as all the evidence shows, that the plaintiff purchased the horse knowing it was sick, but supposing it to be sick only with a cold, the material part of the question was whether he agreed to assume the risk of such sickness as the horse might have. The question is therefore single, and a negative answer thereto by the jury necessarily disposes of the contention on that branch of the case against the defendant.

3. The fourth assignment of error raises only the question whether there was any evidence to go to the jury of the making of a warranty that the horse was sound and well, except for a cold. There is abundant evidence at least tending to prove that there was such oral warranty. The defendant contends, however, under both the fourth and the seventh assignments of error, that the signing of the note above referred to was a reduction of the contract to writing, so that any evidence of a parol warranty was inadmissible. This contention cannot be sustained, for it is obvious that the note does not in terms purport to state the whole contract, and the evidence of the transaction makes still clearer

the fact that it does not. It was only a method of evidencing a promise to pay a portion of the purchase price, and to secure the same. It was a document in execution of a part of the contract in fact made, instead of one purporting to declare the terms of the contract. Such writing does not exclude proof of a parol warranty. *Hahn v. Doolittle*, 18 Wis. 196; *Red Wing Mfg. Co. v. Moe*, 62 Wis. 240; *Smith v. Coleman*, 77 Wis. 343.

We discover no error in the record.

By the Court.— Judgment affirmed.

BARDEEN, J., took no part.

CROWNS VS. FOREST LAND COMPANY.

November 4, 1898 — February 21, 1899.

Relief against judgment: Bill of review: Leave of court.

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1. The Code was intended to be a complete system in itself, and a complete substitute for the old forms of action and methods of practice. Under it the old bill of review does not exist, but relief against a judgment obtained against a party through his mistake, inadvertence, surprise, or excusable neglect may be granted on motion within one year after notice, or a motion for a new trial may be made on the ground of newly discovered evidence at any time within one year after verdict or finding; but if the discovery is not made within the year, there is no remedy unless the facts discovered show fraud or collusion, in which case relief may be obtained in a direct action.
2. No leave of court is necessary before commencing such an action.

MOTION for leave to file a bill of review. *Denied.*

In 1880, one Otto D. Bjorquist conveyed a tract of land to defendant, and took back a mortgage for $16,000, which was afterwards assigned to plaintiff. The mortgage was foreclosed, the property sold, and a judgment for deficiency

entered against defendant. An appeal from both judgments was taken to this court by the defendant, and the judgments were affirmed. [99 Wis. 103.] While these appeals were pending, the defendant made a motion in the superior court for leave to amend its answer, and set up new matters in the nature of a cross bill, bringing in new parties. After the judgments had been affirmed in this court, and the *remittitur* had been filed in the superior court, that court made an order vacating such judgments conditionally, and permitting such defense to be made. Upon appeal to this court, this order was reversed. [100 Wis. 554.] After the judgment of deficiency had been rendered, the plaintiff commenced a creditor's action, based thereon, against the defendant and its stockholders. While this action was pending, defendant claimed to have discovered facts with relation to the original transaction which rendered it fraudulent, and thereupon obtained leave from the superior court to set up the facts in the creditor's action and bring in new parties thereto. This action is now pending.

On November 9, 1898, the defendant filed a petition in this court, setting out the facts as above stated, and alleging the facts at length upon which it relies to show that the transactions with Bjorquist, and the judgments mentioned, are fraudulent and inequitable. It asks an order of this court granting leave to prosecute its cross bill or complaint in the creditors' action, or for leave to bring an action in equity against the parties, in the nature of a bill of review, to set aside the judgments heretofore mentioned.

For the motion there was a brief by *Nath. Pereles & Sons* and *Edwin S. Mack*, and oral argument by *C. F. Hunter*. They argued that a bill of review might be brought upon discovery of new facts which would change the merits of the claim, leave of court being first obtained. Story, Eq. Pl. §§ 412–415; Daniell, Ch. Pr. 1577, 1578; Freeman, Judgments, § 485; *Stowell v. Eldred*, 26 Wis. 504; *Barber v.*

Rukeyser, 39 Wis. 590; *Hiles v. Mosher*, 44 Wis. 601; *Nevil v. Clifford*, 55 Wis. 161, 163, 169; *Hooper v. Smith*, 74 Wis. 530; *Ketchum v. Breed*, 66 Wis. 85, 97, 99.

W. J. Turner, *contra*.

BARDEEN, J. The relief sought on this motion opens an inviting field. It is a singular circumstance that, after nearly a half century of practice under the Code, the question of practice here presented should have been left open and undetermined. True it is that, under some of the earlier decisions of the court, language has been used that would seem to justify the idea that the bill of review of the old practice is still a proper remedy under the Code. But when we come to consider the object and purpose of the new system; when we keep in view the fact that the new order was intended as a complete substitute for the old; that the artificial foundation of the old system has been swept away, the incongruity of the idea becomes manifest. A recent discussion of the objects and purposes of the Code by Mr. Justice MARSHALL, in *Kollock v. Scribner*, 98 Wis. 104, gives emphasis to the situation. What he there said, and the authorities cited, pay tribute to the wisdom of the framers of the new system, and show most clearly the end sought to be attained.

A review of the cases decided in the early days of the Code makes manifest the fact that the judges and lawyers who practiced under the old system were very reluctant in yielding homage to the new. As justly remarked by Mr. Pomeroy, in his very able work on Code Remedies (§ 31): "The profession and the courts have been left to work their way in the dark, and the consequence has been an utter confusion and uncertainty, which have gone far to defeat the beneficial purposes of the reform, and to create a conviction in the minds of many very able lawyers and judges that the change was a positive evil." Their reluctance to conform

to the new system has given rise to much confusion and uncertainty in practice, and this court can claim no immunity from mistakes in that direction. The prime idea that must be kept in mind is that the Code was intended to be a complete system in itself, and a complete substitute for the old forms of actions and methods of practice.

There is absolutely no reason for claiming that the old bill of review exists under our present system. In the *Kollock Case* Judge MARSHALL has demonstrated that the ancient cross bill, so potent for good under the equity practice, has no existence under the Code; but the Code permits the answer to be framed to cover all the purposes of the cross bill which it displaces. Reference, we think, to the statutes will show that remedies have been preserved therein, or authorized thereby, fully adequate to meet the needs of all parties litigant. The policy of the law is to put an end to litigation. The Code, therefore, cut off and wiped out many of the forms of procedure existing under the old practice, that had a tendency to delay or prolong litigation. First, it abolished all distinction between actions at law and suits in equity. Stats. 1898, sec. 2600. It said, further, that the court should, in every stage of an action, disregard any error or defect in the pleadings or proceedings which did not affect the substantial rights of the adverse party, and that no judgment should be reversed or affected by reason of any such error or defect. Id. sec. 2829. The court was further authorized, upon the trial, or at any other stage of the action, before or after judgment, to amend pleadings and processes, etc., to make them conform to the facts. Id. sec. 2830. Within one year after notice, the court might, in discretion, relieve a party from a judgment or other proceeding against him "through his mistake, inadvertence, surprise or excusable neglect," and might supply omissions when the party had failed to conform to the law, and permit amendments to make the proceedings conformable thereto.

Id. sec. 2832. The language of the section is broad, and has received a liberal construction. Under another statute a motion for a new trial upon newly discovered evidence could be made at any time within one year after the verdict or finding. Id. sec. 2879. And this seems to apply to what are called equitable, as well as legal, actions. *Carroll v. More*, 30 Wis. 574; *McWilliams v. Bannister*, 42 Wis. 301; *Smith v. Smith*, 51 Wis. 665. Other provisions of the Code might be mentioned, which tend to make it a harmonious whole, and which afford an aggrieved litigant an opportunity to secure relief and protect his rights as fully as under the old practice.

Under the old equity practice, a bill of review, strictly so called, could only be urged after a final decree. Its purpose was to reverse or modify a decree for error of law apparent on the face of such decree, or on account of new facts discovered since publication was passed in the original cause. Since the adoption of the Code, no one has pretended that a judgment could be reviewed by this proceeding for errors on the face thereof. The suitor has always been left to his remedy either by motion, writ of error, or appeal.

The question of whether a bill of review will lie in this state on the other ground stated has never been definitely determined. In the early case of *Parish v. Marvin*, 15 Wis. 247, the action was to reverse the judgment of another circuit court, and for a perpetual injunction. The action was considered to be in the nature of a bill of review, and Judge DIXON says: "If proceedings in the nature of a bill of review may still be taken, they must be had before the court in which the judgment was rendered." On the point that one circuit court has no jurisdiction to open, review, set aside, or reverse the judgment of another circuit, the decisions are numerous and uniform. *Fenske v. Kluender*, 61 Wis. 602; *Coon v. Seymour*, 71 Wis. 340; *Cardinal v. Eau Claire L. Co.* 75 Wis. 404; *Stein v. Benedict*, 83 Wis. 603.

In the case of *Fenske v. Kluender* it is said that the action was in equity, and, had the plaintiff been a party to the judgment sought to be affected, the action would have been one to review and annul the judgment therein. The opinion reads: "If the plaintiff can maintain an action of this nature at all (a proposition not here decided), such an action must be governed by the same rules applicable to bills of review." The case was affirmed on the ground that the action was not commenced in the court which rendered the judgment sought to be reviewed, and because leave had not been obtained to commence the action, in analogy to the old practice. *Ketchum v. Breed*, 66 Wis. 85, was a case of a bill of review pure and simple. The right to maintain it was denied on the ground of the laches of the moving party, and it was said in the opinion that, because of that fact, it was unnecessary to determine whether the old remedy by bill of review had been abrogated or not.

Thus, it will be seen that, whenever the question has been presented, it was left without determination. In the cases cited, expressions are used speaking of bills of review and bills in the nature of a bill of review. In the old practice the distinction consisted in the fact of whether the decree had been enrolled or not. If the decree had been enrolled, the bill of review was proper. If the decree had not been enrolled, then a bill in the nature of a bill of review would lie, and was usually accompanied by a petition to rehear the original case. Story, Eq. Pl. §§ 421, 422. Under the latter head, and under the Code, the relief sought to be secured thereby is usually obtained by motion, as the judgment is within the control of the court and may be reviewed or modified at any time during the term.

It must be borne in mind that, under our system, remedies in a court of justice are divided into actions and special proceedings (Stats. 1898, sec. 2594); that actions are either civil or criminal (Id. sec. 2597); that all the old forms of ac-

tions have been abolished, and only one form of action is permissible, which is denominated a civil action (Id. sec. 2600); that the distinction between judgments and decrees no longer exists, and that the final conclusion of the court in an action is a judgment (Id. sec. 2882), and not a decree. The new procedure provides the manner in which these judgments can be attacked in the cases heretofore mentioned. It does not assume or attempt to divest the courts of the jurisdiction they formerly possessed to protect the rights of parties when fraud had intervened. It does say, however, that in this state there is but one form of action for the enforcement of private rights and the redress or prevention of private wrongs, which is a civil action. Cases have arisen, similar to the one set out in the petition, when alleged circumstances of fraud and collusion in the transaction upon which the judgment was based, or in obtaining the judgment itself, have come to light after the limitation had expired under which the party could move for a new trial. The aggrieved party is not without remedy. Courts of equity, under the old regime, had the power of control over the parties, and would prevent them from asserting rights based upon judgments tainted by fraud or covin. That power exists to-day, but it must be invoked and enforced in harmony with the true spirit and in accordance with the positive requirements of the new order. But the same obligation of vigilance and diligence on the part of suitors is yet recognized and enforced. A party seeking relief must be diligent and vigilant in asserting his rights, or go without day.

We have said that the true spirit of the law was to put an end to litigation. Stats. 1898, sec. 2879, limits the time within which a motion for a new trial may be made, on the ground of newly discovered evidence, to one year from the verdict or finding. But suppose, as in this case, the facts upon which the fraudulent character of the transactions re-

sulting in the judgment sought to be attacked depends were not discovered until the expiration of the year, is the party without remedy? While it may rightly be said that the ground upon which defendant seeks relief is newly discovered evidence, yet it is evidence showing fraud and collusion, concealed by the parties to it, and which, it is claimed, has resulted most harmfully to the defendant. This was a favorite subject of relief in equity.

There can be no question of the jurisdiction of a court of chancery to relieve against fraud. In *Stowell v. Eldred*, 26 Wis. 504, we read that "chancery will relieve against a judgment at law, on the ground of its being contrary to equity, when the defendant in the judgment was ignorant of the facts in question pending the suit, or it could not have been received as a defense, or when he was prevented from availing himself of the defense by fraud or accident, or the acts of the opposite party, unmixed with negligence or fault on his part." The same proposition is repeated in *Barber v. Rukeyser*, 39 Wis. 590; and *Hiles v. Mosher*, 44 Wis. 601. Suits to restrain the execution or enforcement of judgments upon equitable grounds have been entertained by this court. *Coon v. Seymour*, 71 Wis. 340; *Nevil v. Clifford*, 55 Wis. 161.

Johnson v. Coleman, 23 Wis. 452, was a case brought to have a judgment of divorce declared to be void and of no effect on the ground of fraud. The court says: "But we can see no substantial objection to the practice of instituting a suit in equity for that purpose. It seems quite as suitable a method to review the questions involved, and to adjudicate upon the rights of the parties, as would be afforded by a motion. Mr. Story says that there is no doubt of the jurisdiction of courts of equity to grant relief against a former decree, when the same has been obtained by fraud and imposition, and this must be done by an original bill in the nature of a bill of review. Story, Eq. Pl. § 426."

In *Hooper v. Smith*, 74 Wis. 530, a motion was made to set aside a deficiency judgment in foreclosure for facts existing before the foreclosure judgment was entered, and also facts that had transpired afterwards. The facts were in dispute, and the rights of third parties were involved. Mr. Justice CASSODAY said: "If the judgment for deficiency was wrongfully obtained, and is inequitable, and the grounds of appellant's motion are meritorious, and he has not lost his rights by laches or otherwise, then there would seem to be no reason why he should not be relegated to his remedy by action. That such an action may be maintained in a proper case has frequently been determined," — citing the cases hereinbefore mentioned. Where the relief is sought on the ground of newly discovered evidence alone, unmixed with any circumstances of fraud or collusion, the application must be made within the time limited by sec. 2879; but, when the action is based upon fraud, the limitation prescribed by subd. 7, sec. 4222, must govern.

We have heretofore adverted to the rule that one circuit court has no jurisdiction to open, review, set aside, or reverse the judgment of another circuit. From this rule another naturally follows, and that is that the action commenced to attack another judgment must be commenced in the court where the judgment attacked was rendered. A very common method of attack is to restrain the execution or enforcement of the alleged vicious judgment. At this point an important consideration is not to be lost sight of. The court, sitting in chancery, does not claim to exercise supervisory power over itself sitting as a court of law; neither will its own judgments be vacated or reversed. It would be an anomaly, indeed, for a court to restrain itself. It is against the offending party that the energies of the court are directed. Its remedial power is executed by putting restraint upon his usual liberty of following up his judgment. It acts upon the person, and not upon the proceeding. Black,

Judgm. § 357; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; Story, Eq. Jur. §§ 875, 1574; *Pelham v. Moreland*, 11 Ark. 442. The judgment itself is not disturbed. The offending party is prevented from reaping the fruits thereof. It is, perhaps, unnecessary to decide to what extent the merits of the original case may be gone into in determining the facts necessary for the party's relief. The cases of *Abouloff v. Oppenheimer*, 10 Q. B. Div. 295, and *Vadala v. Lawes*, 25 Q. B. Div. 310, may be consulted with profit on that question. It may be proper to say that the court ought to, and will, make such an examination of the facts as to ascertain the right and equity of the parties, and will grant such relief as is proper to protect such rights.

Something has been said in the cases in regard to obtaining leave of court before such an action can be commenced. The petitioner in this case seems to labor under the idea that it must have the consent of this court before it can proceed. We know of no rule of court or statute making any such requirement. Under the old practice, bills brought to impeach decrees for fraud could be filed and prosecuted without leave of court (Story, Eq. Pl. § 426; *Kimberly v. Arms*, 40 Fed. Rep. 548). But when founded on new facts, discovered after the decree, such leave was necessary (3 Ency. of Pl. & Pr. 587). If, as we have endeavored to show, the old practice does not exist in this state, and the proper remedy, if any exists, is by direct action, then we are unable to see any reason why the analogies of the old practice should apply. Especially is this so when we keep in mind the fact that, in all such cases, the power of the court is directed against the parties, and not against the proceeding attacked. Courts are jealous of their judgments, but their power will never be extended to protect a party whose transactions are tinctured with fraud.

What we have said in relation to the existence of the practice by bill of review in this state is based upon the fact

that it has not been preserved or recognized in our Code. In some jurisdictions the practice has been preserved in its entirety. In others, it has been limited by express statutory enactment, or been held, under the peculiar language of the Code adopted, to exist as a cumulative remedy. Interesting discussions confirmatory of the position we have taken may be found in the following cases: *Corry v. Campbell*, 34 Ohio St. 204; *Brooks v. Howard*, 55 N. H. 69; *Seguin v. Maverick*, 24 Tex. 526; *Jacks v. Adair*, 33 Ark. 161; *Nealis v. Dicks*, 72 Ind. 374; *Brower v. Cothran*, 75 Ga. 9.

We express no opinion upon the merits of the defendant's showing of facts as a basis of the relief sought. The questions of diligence, and of the persuasive nature of the circumstances alleged as grounds for relief, are for the determination of the trial judge when the matter is properly planted in court.

By the Court.— The motion is denied, with $10 costs.

THE STATE EX REL. THE FIDELITY & CASUALTY COMPANY OF NEW YORK, Appellant, vs. FRICKE, Commissioner of Insurance, Respondent. 102 107 *102 118

November 23, 1898 — February 21, 1899.

Accident insurance: License fees: Mandamus: *Statutes: Practical construction.*

1. The annual license fee of $300, required by sec. 1220, R. S. 1878, to be paid by foreign accident insurance companies desiring to do business in this state, is levied upon the business transacted, and not upon the companies transacting the business. Ch. 105, Laws of 1880, was simply an amendment, which added to the fee previously required a payment of two per cent. upon the gross income received upon accident insurance business during the preceding year. *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, and 99 Wis. 367, followed.

2. From 1880 to 1897 a foreign accident insurance company was licensed to transact business in this state without paying the $300 license fee required by sec. 1220, R. S. 1878. As a condition for renewing its license for 1898, the insurance commissioner required it to pay $300 for each year it had so transacted business, with interest from the time it became due. *Held*, that since the company's right to transact business in this state is a matter of privilege, and the legislature has authorized the commissioner to revoke a license for past violations, or withhold a license until the company has complied with all legal requirements, a writ of *mandamus* to compel the issuance of the license without the payment of said arrearages was properly refused.

3. The fact that the statute of limitations may have run as to part of said arrearages would not prevent the commissioner from requiring payment of that part as a condition of the issuance of a new license; nor would the fact that no demand for arrearages was made until November, 1897, render the claim so stale that interest should not be allowed.

[4. Whether a foreign corporation doing business in this state under legislative authority may, in a proper case, take advantage of the statute of limitations, not determined.]

5. The statute not being doubtful or ambiguous, the mere silence of the state officials, or their neglect to enforce the plain requirements of the law, is not sufficient to relieve the companies from their obligations, on the ground of practical construction.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The relator, *The Fidelity & Casualty Company of New York*, filed its petition for an alternative writ of *mandamus* in the circuit court for Dane county, claiming that the defendant, as commissioner of insurance of this state, unlawfully refused to issue it a license to do business in this state for the year 1898. The alternative writ was issued, and due return made thereto. The issue joined was tried by the court, and his findings thereon may be summarized as follows:

The relator is a corporation organized under the laws of the state of New York, and authorized to do the business of accident insurance. The company first applied to do

business in this state in 1880, and each year since has applied for and received license to transact business in this state, up to March 1, 1898. Each year it has paid to the state treasurer two per cent. of its gross income earned in this state, and has complied with all the requirements imposed by the laws of this state, except that it has not paid the annual license fee of $300 required by sec. 1220, R. S. 1878. No demand was ever made upon said company for such fees prior to November, 1897, at which time, the defendant made such demand and required as a condition for renewing its license, which would expire on March 1, 1898, that it pay an annual license fee of $300 for each year it had done business in this state, with interest at the legal rate on each such license fee from the date it became due. The company refused to pay such fees or any part thereof. The amount of such fees on March 18, 1898, with interest, was $9,076.70. The company applied for license for the year 1898, but the defendant refused to issue one, because it had failed to pay the license fees above mentioned.

Under this state of facts the court concluded that the relator was an accident insurance company, within the meaning and purview of ch. 105, Laws of 1880, and sec. 1220, R. S. 1878, and not entitled to a license to transact business in this state until it had paid all back license fees before mentioned, with interest, and that upon such payment, and not otherwise, the peremptory writ might issue. The judgment entered upon such findings is sought to be reversed on this appeal.

For the appellant there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas*, counsel, and oral argument by *F. C. Winkler*. They argued, *inter alia*, that the payment of $300 being imposed upon foreign life and accident insurance companies "as an annual license fee for transacting such business," the imposition by subsequent law upon such a company of any other pecuniary duty "as an annual license fee

for transacting its business" would *ipso facto* supersede the former provision. It could not be held to be "in addition," unless there were adequate words to that effect. *Gurr v. Scudds*, 11 Exch. 191; *U. S. v. Isham*, 17 Wall. 496, 502; *Partington v. Attorney General*, L. R. 4 Eng. & Ir. App. 100, 122; *Powers v. Barney*, 5 Blatchf. 202; *Russell v. Wigglesworth*, 2 Story, 369, 373; *State v. Pullman's P. C. Co.* 64 Wis. 89, 103. Although ch. 105, Laws of 1880, does not say *in hæc verba* that such companies shall pay two per cent. of their gross premiums "as a license fee," etc., yet in saying that they "shall be subject to the same fees and *taxes* as are now paid by fire insurance companies," it necessarily means that they shall pay them for the same purposes and with the same effect. That act evinces a purpose to establish equality between accident and fire insurance companies, applying to them the more just and equitable rule of prorating the license fee to the amount of business done. It was the obvious purpose of ch. 105 to allow accident companies to make insurance not only against bodily injuries or death, but also against accidents to property, against dishonesty in persons holding places of trust, and the like, and it would be unjust to require those different classes of companies to pay the same arbitrary sums. There is no plain language in any of these statutes which requires payment of both the $300 and the two per cent., and hence practical construction may be applied to them.

John L. Erdall, first assistant attorney general, for the respondent.

The following opinion was filed December 16, 1898:

BARDEEN, J. The facts at issue in this litigation are very much the same as were involved in the cases of *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, and *S. C.* 99 Wis. 367. In those cases the company had paid the $300 license fee, and not the two per cent. on its gross earnings. In this case the

relator had paid the two per cent. on its income, as required by ch. 105, Laws of 1880, but has not paid the $300 annual license fee imposed by sec. 1220, R. S. 1878. In his brief, counsel for relator, after reviewing the facts involved in the former litigation, said, "The question, therefore, whether an accident insurance company organized under the laws of another state was, after ch. 105, Laws of 1880, required to pay $300 per annum *in addition* to the 'fees and taxes' thereby imposed, although discussed, has not been adjudicated by this court." Pursuant to this statement, counsel has submitted a vigorous and carefully prepared argument in his brief, and pressed the same with great vehemence at the bar, as to the construction this court ought to give to the statutes mentioned.

The earnestness of the counsel, and the importance of the questions involved, have induced us to carefully review the former litigation and the questions therein determined. We find it entirely unnecessary to attempt to justify those decisions. They represent the deliberate judgment of the court, after a careful and exhaustive argument and consideration of all of the questions involved. The suggestion of counsel that the construction of the statutes mentioned was not necessary for the determination of those cases is met by casual reading of the opinions filed. The question was certainly presented, carefully argued, and deliberately considered by the court. Speaking of ch. 105, Mr. Justice WINSLOW says: "Although this act was not in terms denominated an amendment to sec. 1220, R. S., its legal effect as such is too plain for argument. It manifestly added to the license fee required of a foreign company doing an accident business in this state by sec. 1220 the fee required in case of a foreign fire insurance company, which, as we have seen, was two per cent. of its gross earnings upon business transacted within this state during the preceding year. We are unable to see any other construction which can be placed upon the act

without emasculating it to such an extent as to make it absurd." 94 Wis. 258. Again, in the second *Travelers' Case*, 99 Wis. 367, the following language was used: "We have no intention of reviewing again the questions already discussed and decided in the previous action. The statutes were then deliberately considered and construed, and the conclusions then reached are entirely satisfactory, and, so far as applicable, they will be applied to the present case. It was then held, in effect, that the annual license fees required to be paid by foreign insurance companies desiring to do business in this state were levied upon the business transacted, and not upon the company transacting the business; . . . that ch. 105 was an amendment, simply, to sec. 1220, R. S., and that it added to the fees previously required a payment of two per cent. upon the gross income received upon accident business during the preceding year." In an argument for a rehearing, counsel again attacked the conclusions of the court with great vigor, but the original decisions were adhered to.

In view of this situation, we do not think there is any room for saying that the question was passed upon only incidentally, and that the conclusion reached was not the result of deliberate judgment. That we may not be misunderstood, we here deliberately assert that in our judgment the same legal questions here contended for by the relator were necessarily involved in the decisions in the *Travelers' Cases*, that they were there deliberately considered and decided, and that we are now satisfied that the conclusions there reached were correct and must govern this case. The application of the doctrine of practical construction placed upon the law by the insurance department, and the question of requiring the company to pay interest upon the amount due the state, were submitted, argued, and decided adversely to the company. What was said in the former cases on these questions renders a new discussion entirely unnecessary.

The findings of the trial court upon the admitted facts show that the insurance company has transacted business in this state since 1880, and has not paid the annual license fee of $300 required by sec. 1220, and that, before it can rightfully compel a license to be issued to it, it must pay the sum in arrears, with legal interest. In the first *Travelers' Case* it was held by this court that, when a license had been granted to an accident insurance company upon the payment only of the $300 fee prescribed in sec. 1220, it might be revoked by the insurance commissioner upon refusal to pay the additional fee required by ch. 105, Laws of 1880. In the second case it was ruled that a current license might be revoked for the refusal of the company to pay amounts due under the statute for past years' business. Following the logic of these decisions, the trial court upheld the commissioner in his requirement that these arrearages should be paid before a new license would be issued. In this ruling he was manifestly right, and we have no disposition to disturb it.

The point is made, however, that as no demand was made for these arrearages until November, 1897, the claim is *stale*, and interest ought not to be required; also, that, under the statute, the relator, having appointed an attorney upon whom process might be served in this state, thereby obtained a legal residence here, and was therefore entitled to the benefit of the statute of limitations. One important fact must not be lost sight of, and that is that this is not an action brought by the state to recover this money. The relator can only do business in this state by sufferance. When it seeks that privilege, it must consent to and obey the conditions attached to the liberty sought for. The legislature has seen fit to vest in the commissioner of insurance the power to revoke a license for failure to comply with any provision of law enacted for the regulation of that business. As an incident to that power, he is authorized to revoke

licenses for past violations, or withhold a license until the insurance company has fully complied with all legal requirements. The terms imposed as a condition for granting the peremptory writ prayed for are strictly in accord with the holding in the last *Travelers' Case*. No good reason is perceived why the rule there announced is not applicable to the case at bar. Courts have a discretion in issuing writs of *mandamus* merely in aid of private right, and, in view of what has already been said, we do not feel that such discretion has been wrongly exercised in this case. We desire, however, to leave open and undetermined the question of whether a foreign corporation doing business in this state under legislative authority may not, in a proper case, have the advantage of the statute of limitations.

By the Court.—The judgment of the circuit court is affirmed.

Upon a motion for a rehearing there was a brief for the appellant by *Winkler, Flanders, Smith, Bottum & Vilas*, and a brief for the respondent by *E. R. Hicks*, Attorney General.

The following opinion was filed February 21, 1899:

BARDEEN, J. Of course it is understood by this court that the *facts* involved in the different cases that have been decided were not exactly the same, but the *law* announced in the first *Travelers' Case* has entered into and been controlling in each subsequent case. [*Travelers' Ins. Co. v. Fricke*, 94 Wis. 258.] In that case it was said that sec. 1220, R. S. 1878, imposed a license upon the *business* of insurance, and not upon the company transacting it. The statute speaks of two kinds of insurance business,— life and accidental,— and therefore, if a company transacts both kinds of business, it must pay the required license for each. If it does but one kind of business, then it must pay the fee imposed by

law for that privilege. The first decision also said that ch. 105, Laws of 1880, in legal effect, was an amendment to sec. 1220, and therefore the company transacting the business of accident insurance must pay two per cent. of its gross premiums to the state, as well as the fee required by the other statute. Independent of the fact that the Travelers' Company was transacting both kinds of business, the two *Travelers' Cases* settled the law that a company doing the business of accident insurance in this state must not only pay the $300 license required by sec. 1220, but also the two per cent. fee imposed by ch. 105. Now, it is urged that, inasmuch as these decisions were made with reference to a company transacting both kinds of business, they have not decided that an accident company which does no life insurance business is bound to pay the same fees. True, they have not in terms so decided. But what significance has the fact that the Travelers' Company was doing both kinds of business? Absolutely none. So far as those decisions are concerned, the case stands exactly as though the Travelers' Company as a life insurance organization, and the Travelers' Company as an insurer against accidents, were separate and distinct companies. When it was said that the license was upon the *business* conducted, it made no difference that the company was doing other kinds of business. The inquiry was, What are the obligations of the law upon a company doing the business of accident insurance in this state? The company sought to evade the consequences of the construction of the law contended for by the state, by showing that it transacted both kinds of business; that it had already paid one license fee of $300; and it was argued that this was the only fee or tax required by law from such companies. In determining this question, it became necessary to review the legislation on the subject, and to construe and determine the relation between sec. 1220 and ch. 105, Laws of 1880.

We have already referred to the conclusion arrived at in the first of these cases. The second case [99 Wis. 367] involved the right of the state to insist upon the payment of an additional license fee of $300 for the transaction of the company's accident business. It seems to have been assumed that the fee that had been paid by the company was for the privilege of doing its life insurance business. In this latter decision, Mr. Justice WINSLOW says: "When it was held that the license fees were levied upon the business, and not upon the company transacting the business, it necessarily followed, under the provisions of sec. 1220, R. S. 1878, that a foreign company which transacted both life and accident business in this state was required to pay two fees of $300 each, and, in addition, was required to pay two per cent. upon its previous year's income arising from the accident business." The company was not required to pay the additional fee of $300 because it was doing *two kinds of business*, but because it was doing an accident business, for which no fee had been paid. When it is assumed that the license is upon the business conducted, the conclusion, and the only conclusion that can possibly follow, is that *any* company doing the business of accident insurance in this state must pay the fees imposed by both of the statutes mentioned. If the company conducts a life insurance business alone, it pays the fee required by sec. 1220. If it does only an accident business, it must pay the fee required by this section, and the additional fee imposed by ch. 105. If it does both kinds of business, then it must pay both fees. Any other construction would be absurd.

On the question of practical construction, the first case decided said, in effect, that these statutes were not doubtful or ambiguous, and that "a customary violation of the plain language of the law gives no authority for continuing such violation." We still adhere to that ruling. The mere silence

of the state officials, or their neglect to enforce the plain requirements of a law, is not sufficient to relieve the party from its obligations.

By the Court.— The motion for a rehearing is denied, with $25 costs.

THE STATE EX REL. THE METROPOLITAN PLATE GLASS INSURANCE COMPANY OF NEW YORK, Appellant, vs. FRICKE, Commissioner of Insurance, Respondent.

November 23, 1898 — February 21, 1899.

Accident insurance: Plate glass: License fees.

A company transacting only the business of insuring plate glass against injury from causes other than fire or lightning is an accident insurance company, within the meaning of our statutes regulating the business of insurance, and as such was required to pay, for the privilege of doing business in this state, an annual license fee of $300 under sec. 1220, R. S. 1878, as well as two per cent. on its gross premiums received in this state, under ch. 105, Laws of 1880.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This case differs from the preceding case of *State ex rel. Fidelity & Casualty Co. v. Fricke, ante*, p. 107, only in that the relator is a corporation organized for and engaged in only the business of insuring plate glass against injury otherwise than by fire. Said relator commenced business in the state of Wisconsin in 1884, and has annually thenceforward paid to the commissioner of insurance two per cent. on its gross premiums received in this state, including those received in 1897, and has applied for a license to do business for the year beginning March 1, 1898. The commissioner of insurance now claims that in each of said years from 1884 to 1898 said company should also have paid the license fee

of $300 required by sec. 1220, R. S. 1878, from all companies engaged in the business of accidental insurance in the state of Wisconsin, and on March 18, 1898, refused to issue a license for the ensuing year, unless said license fees, amounting with interest from the dates when they were respectively due to $6,540, were paid. The relator in this action prays for a writ of *mandamus* requiring the respondent, as commissioner of insurance, to issue to said corporation a license authorizing it to do the business of plate-glass insurance within the state of Wisconsin during the period of one year, commencing March 1, 1898, and offers to pay whatever sum the court may decide is legally due.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. C. Winkler*.

John L. Erdall, first assistant attorney general, for the respondent.

The following opinion was filed December 16, 1898:

DODGE, J. It is of course unnecessary, again, in this case to discuss the questions disposed of in the *Fidelity & Casualty Company Case*. That accident insurance companies were required by the statutes existing in March of the present year to pay, not only two per cent. on the gross premiums received during the year 1897, but also a license fee of $300, is established, as also the conclusion that this court will not by *mandamus* restrain the commissioner from making the payment of any delinquent fees for past years, together with interest thereon, a condition of issuing a license, whether or not an action to recover any such fees would be barred by the statute of limitations.

The relator strenuously contends, however, that even though such conclusion be reached with reference to the Fidelity & Casualty Company, engaged in the business of insuring against death or injury from accidents to the person of the assured, yet a clear distinction exists in favor of

the present corporation, which can and does only insure against injuries to plate glass from causes other than fire; insisting that such a company does not come within the description of sec. 1220, imposing a $300 license fee on "every company transacting the business of life or accidental insurance in this state;" arguing with much force, and much support from the authorities, that at and prior to the year 1878, when sec. 1220 was adopted as a revision of statutes existing since 1870, the words "accident insurance" or "accidental insurance" did not embrace anything besides insurance against accidents to the person insured,— citing to this proposition Beach, Ins. § 211, to which might added Bouv. Law Dict. (1897), 1076; *Employers' L. Ass. Corp. v. Merrill*, 155 Mass. 404.

If it be conceded, however, that sec. 1220, which imposes the $300 license fee upon every company doing the business of accident insurance in this state, would not, when enacted, have applied to the relator, it follows that the relator could not at that time have engaged in its peculiar business in the state of Wisconsin. Sec. 1978 provided: "No corporation, association, partnership, or individual shall do any business of insurance of any kind, or make any guaranty, contract or pledge for the payment of annuities or endowments, or money to the families or representatives of any policy or certificate holder, or the like, in this state, or with any resident of this state, except according to the conditions and restrictions of these statutes. And the term insurance corporation, as used in this chapter, may be taken to embrace every corporation, association, partnership, or individual engaging in any such business." It could not be contended that any other section than 1220 could be so applicable to the business of plate-glass insurance as to authorize its conduct in the state.

By ch. 105, Laws of 1880, "accident insurance companies" were authorized to insure against injuries to property by causes other than fire or lightning; and no other statute is

pointed out, or believed to exist, which could authorize the conduct of the relator's business in the state from that time until the Wisconsin Statutes of 1898. It must be assumed, therefore, that its applications for licenses from 1884 onward have been made and granted under the authority of the last-mentioned statute [ch. 105, Laws of 1880]. It will be observed, however, that ch. 105, Laws of 1880, authorizes this kind of business to be done only by *accident insurance companies*, which expression is, of course, to have the same meaning as elsewhere in the insurance statutes; this act of 1880 being not an isolated piece of legislation, but part of a system of statutory regulation of insurance business. We seem, therefore, to be driven into a dilemma which may be stated as follows: If a company transacting only the business of insuring plate glass against injury from causes other than fire or lightning is an accident insurance company, within the meaning of the insurance regulations, then sec. 1220 of the Revised Statutes has required that it pay each year a license fee of $300. If, however, such a company is not an accident insurance company, it has no authority to conduct its business in this state. Being driven into this dilemma, we have next to consider which horn of it to choose,— whether to decide that the expression "accident insurance companies," in ch. 105, Laws of 1880, was used in a strictly limited sense, meaning only companies which are engaged in the business of insuring against accidents to the person of the assured, and is an authority only to that class of companies to do the additional business of insurance against injuries to property from causes other than fire, or to hold that the legislature in 1880 meant to legislate that all of said varieties of insurance should come under the classification of accidental insurance and might be written in this state by any corporation authorized so to do by its charter, whether also authorized to write insurance for personal accidents as well or not.

It would seem, in view of the development of the business apparent from the records in the office of the commissioner

of insurance and from the showing of this relator, that the interests of the citizens of Wisconsin demanded plate-glass insurance, and we may therefore infer that the legislature in 1880 meant to recognize and provide for this demand. In order to accomplish that result fully, the latter construction is necessary, namely, that a company authorized by its charter merely to write insurance against injuries to property by causes other than fire is authorized to do business in this state, and, as a result, that it is legislatively declared to be an accident insurance company, within the meaning of our statutes.

The adoption of this construction of the statute does no violence to its language. Accident insurance, colloquially, easily includes insurance against injuries to plate glass. Nor is it one of which the relator certainly can complain, for ever since 1884 that company has availed itself of the privilege of doing business in this state, and can have found its authority nowhere save in such a construction of this statute of 1880.

The relator is therefore in the same position, and subject to the same charges, as the Fidelity & Casualty Company, and was required by law to pay each year, not only two per cent. on its gross premiums received in this state, but also, on or before March 1st of each year, a license fee of $300. The circuit court was right in refusing a peremptory writ of *mandamus* to compel issue of license until these annual fees be paid, with interest from the several dates when they were respectively due by law.

By the Court.— The judgment of the circuit court is affirmed.

Upon a motion for a rehearing there was a brief for the appellant by *Winkler, Flanders, Smith, Bottum & Vilas*, and a brief for the respondent by *E. R. Hicks*, Attorney General.

The motion was denied February 21, 1899.

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SKOBIS and another, Respondents, vs. FERGE and others, Respondents, and THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, Appellant.

February 4—February 21, 1899.

Assignment of chose in action: Liability of debtor to assignee: Consent: Partial assignments: Priority: Regents of university: Contracts: Oral modifications.

1. A contractor for work on a building procured from the architects several certificates of the amounts which he had earned in different departments of the work, in advance of the time fixed by the contract for payment, and delivered them to subcontractors for those departments, with intent thereby to assign the corresponding portions of the fund to which he was to become entitled. *Held*, that there was in equity an effectual assignment as between the parties and as against the contractor's assignee for the benefit of creditors under a voluntary assignment subsequently made.
2. General information that his creditor is likely to borrow on the credit of a debt, or that he has in other instances borrowed upon it, or a mere suspicion that the creditor might have made an assignment to others, does not render a debtor liable to an assignee in respect to payments made to the original creditor before receiving exact and specific notice of the assignment.
3. The assent of the debtor is essential to the existence of a direct liability to the assignee of a part of a fund in the hands of one not a banker.
4. The chairman of a special committee of the board of regents of the state university charged with the general direction of certain work has no authority, unless the same has been given him by the board, to modify the written contract which the board has authorized in respect to such work.
5. A conversation between a contractor and the chairman of a special committee of the board of regents which has general direction of the performance of the contract is not binding on the board to vary the terms of the written contract thereafter formally executed.
6. No verbal explanations or assurances by individual members of the board of regents could bind the board to an agreement either to pay or to guarantee the amount of a subcontract, nor subject the public moneys under its control to liability in excess of that authorized by the board.

7. Where the contractor for work on a building for the board of regents, having obtained from the architects several certificates of amounts earned, assigned them at the same time to subcontractors to apply on existing debts to the latter, and the board of regents did not consent to any of the assignments so as to become liable to the assignees, the equities of the assignees are equal, irrespective of any priority in giving notice to the board.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

In March, 1896, the *Board of Regents of the University of Wisconsin*, having decided to make certain additions and repairs to Ladies' Hall, entered into a contract with Thomas R. Bentley, of Milwaukee, for the construction thereof, to be completed by January 1, 1897, for the sum of $50,742, to be paid, $5,000 on the 1st of August, 1896; $10,000 on the 1st of October, 1896; and the balance between February 1 and March 1, 1897; "all payments to be made upon written certificates of the architects to the effect that such payments have become due." Before the making of said contract, the board of regents appointed a subcommittee, designated as the Ladies' Hall committee, which continued throughout the performance of the contract, and had general direction thereof. John W. Bashford of Hudson was chairman of that committee. After the contract had been awarded by the board itself, and signed by the chairman of the executive committee, and taken to Milwaukee by Bashford, the contractor, Bentley, complained that the extreme postponement of payments would embarrass him, and requested that the architect might from time to time issue certificates of completion of parts of the work without regard to the contract dates of payment, which he could use in raising money and otherwise in carrying out the contract, to which, it is claimed, assent was given by John W. Bashford verbally. The contract was thereupon signed by Bentley, who at once entered actively upon the work of construction, and seems to have pushed the same with great

vigor, so that on May 25, 1896, the architects, Ferry & Clas, certified that he had become entitled to the payment of $3,000, payable as per contract August 1, 1896, and on July 2d certified that he was further entitled to the payment of $6,000, as per contract. On August 31, 1896, Bentley again applied to the architects for certification of the amount earned, and the architects, at his request, issued to him five certificates, namely: One of $2,000, which varied from the ordinary certificates only in describing him as "contractor for iron work;" one of $450, which described him as "contractor for painting and glazing;" one of $1,800, which described him as "contractor for the plumbing and gas fitting;" one of $600, which described him as "contractor for the tin and galvanized iron work;" and one of $12,000, which described him, as did all of the others, as "contractor for an addition to and remodeling of Ladies' Hall."

Shortly after the issue of the five certificates on August 31st, viz. on or about September 1st, Bentley delivered the $2,000 certificate to the plaintiffs, Skobis Bros.; the $450 certificate to Thomas P. Nelson, who shortly afterwards assigned it to the defendants Rohde & Patek Bros.; the $1,800 certificate to *William Owens;* and the $600 certificate to Stephenson & Studeman, in consideration of sums owing them severally for work as subcontractors. These transactions, it was found by the trial court, were intended as assignments of the several amounts of the certificates. Neither Skobis Bros. nor Stephenson & Studeman made any attempt to notify the board of their assignments until after final settlement had been made with Bentley, nor until after his failure. Rohde & Patek Bros., on October 10th, gave written notice to the secretary of the board of the assignment to them. The secretary immediately replied, refusing to recognize them, and saying that payments would be made only to Bentley. The evidence is indefinite; but the court

finds that, within a few days after receiving said certificate, *Owens* duly presented the same to Riley, the secretary of the board, notified him that he held the same, and thereafter, and prior to February, 1897, informed B. J. Stevens, a member of said board and chairman of the executive committee, that he held said certificate; and that on or about February 7, 1897, he again presented said certificate to said Riley, secretary, who informed him that the said certificate would be paid, and also that Bentley's bills for estimates had been allowed, and "I better see him." The fact of presentation to Riley soon after receipt of the certificate, as found by the court, has very doubtful, if any, support in the evidence, but, in the view taken of this case, it is not material to the decision. It is also claimed by *Mr. Owens* that he entered into the subcontract with Bentley to do the plumbing and gas-fitting upon a guaranty by the board of regents that they would see that he was paid. The evidence on that subject appears in the opinion.

Payments were made to Bentley from time to time, by resolutions of the executive committee of the board of regents, as follows: On August 3d, $9,000; September 24th, $2,000; October 5th, $8,000; November 2d, $11,000; December 8th, $1,791.65; and February 4th, $18,000, the last payment being made after the full completion of the work, and leaving a balance unpaid, of combined contract price and extras, of $2,833.69. On February 11, 1897, Bentley made a voluntary assignment for the benefit of creditors to defendant *Ferge*.

Much evidence was offered and received to establish that Bashford knew, before the contract was entered into, and that Riley, the secretary, and perhaps some other members of the board, had knowledge, in the course of the performance of the contract, that Bentley was borrowing money on the faith of what he was to receive on the contract, and was using the certificates from the architects, declaring the

amount which had been earned, as an aid in so doing; but there is no evidence tending to show that any of the board of regents had notice of any purpose on the part of Bentley to assign portions of the moneys coming due on the contract to any of these subcontractors.

The defendant *Ferge* claims that the transactions between Bentley and the several holders of said certificates were not such as to work an equitable, or any, assignment of the funds in the hands of the board of regents, and that therefore he, as assignee, is entitled to said balance of $2,833.69. The several holders of said certificates contend that said transactions did constitute equitable assignments to them, and that thereby the defendant the board of regents became indebted to them for the amounts specified in said respective certificates. The defendant the board of regents contends both that said transactions were not sufficient to constitute assignments to the several holders thereof, and, further, that, even if so sufficient, the board of regents was chargeable with no liability to said assignees; and, after interpleading all of these various interests, it prayed that it might be allowed to deposit the balance of $2,833.69 in court, and be dismissed, with its costs. The court adopted substantially the contention of the holders of certificates, and rendered judgment against the board of regents in favor of each of them for the amounts of their respective certificates, with interest thereon from the 15th day of February, 1897, and for taxable costs. From these judgments, consolidated in one and aggregating $5,310.47, the board of regents brings this appeal.

The cause was first argued on November 26, 1898.

For the appellant there was a brief by *F. A. Geiger*, and oral argument by *Mr. Geiger* and *Mr. Geo. H. Noyes*. They argued, *inter alia*, that the transfer of the architects' certificates did not amount to an equitable assignment of portions of the proceeds of the contract to the holders. The assignor

still retained control of the fund. *Christmas v. Russell*, 14 Wall. 69; *Dirimple v. State Bank*, 91 Wis. 601; *Baillie v. Stephenson*, 95 Wis. 500; *Cowperthwaite v. Sheffield*, 3 N. Y. 243. If these subcontractors were equitable assignees, it was their duty, in order to protect their title to the funds, to give prompt notice to the regents. Their failure to do so was gross and culpable negligence. *Spain v. Hamilton's Adm'r*, 1 Wall. 604; 2 Pomeroy, Eq. Jur. §§ 695, 698, 702; Wade, Notice, § 435; *Judson v. Corcoran*, 17 How. 612; *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246; *Meghan v. Mills*, 9 Johns. 63; *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Van Keuren v. Corkins*, 66 N. Y. 77; *Loomis v. Loomis*, 26 Vt. 203. The notice should be sufficiently precise to put the defendant fully on his guard as to the fact of such assignment, and he should have understood it. *Renton v. Monnier*, 77 Cal. 450; *Crouch v. Muller*, 141 N. Y. 495; *Heermans v. Ellsworth*, 64 N. Y. 159; *Cahoon v. Morgan*, 38 Vt. 234; *Stoddard v. Gailor*, 90 N. Y. 579; *Beck v. Cole*, 16 Wis. 99.

For the respondents there were separate briefs by *McElroy & Eschweiler*, attorneys for *Skobis Bros.*, *Nath. Pereles & Sons*, attorneys for *Rohde & Patek Bros.*, and *R. M. La Follette* and *Gilbert E. Roe*, attorneys for *William Owens* and *Stephenson & Studeman;* and the cause was argued orally by *W. J. McElroy*, *C. F. Hunter*, and *Mr. Roe*. They argued, among other things, that the transfer of the architect's certificates did constitute equitable assignments of portions of the funds, and that the regents had sufficient notice thereof. *Baillie v. Stephenson*, 95 Wis. 500; 6 Am. & Eng. Ency. of Law, 656; *Fairbanks v. Sargent*, 6 L. R. A. 475; *Williams v. Ingersoll*, 89 N. Y. 508; *Pass v. McRea*, 36 Miss. 143; *Kimball v. Donald*, 20 Mo. 577; *Garnsey v. Gardner*, 49 Me. 167; Wade, Notice, §§ 437, 438; *Hackett v. Martin*, 8 Me. 77; *Parker v. Kane*, 4 Wis. 16; *Commercial Bank v. Colt*, 15

Barb. 506; *Smith v. Smith*, 2 Cr. & M. 231; *Chapman v. Plummer*, 36 Wis. 263; *Pease v. Landauer*, 63 Wis. 20; *Arpin v. Burch*, 68 Wis. 619; *Lanigan's Adm'r v. Bradley & C. Co.* 50 N. J. Eq. 201; *Crouch v. Muller*, 141 N. Y. 495; *Union Iron Works Co. v. Kilgore*, 65 Minn. 497; *Lauer v. Dunn*, 115 N. Y. 405; *Helms v. Chadbourne*, 45 Wis. 60, 70; *Brinkman v. Jones*, 44 Wis. 498. The approval by the board of regents of these certificates amounted to an acceptance thereof, and they were bound to retain in their hands sufficient funds to meet them when presented. *Industrial Bank v. Bowes*, 165 Ill. 70; *Funk v. Babbitt*, 156 Ill. 408; *Meads v. Merchants' Bank*, 25 N. Y. 143; *Spring v. S. C. Ins. Co.* 8 Wheat. 268; *Cutler v. McCormick*, 48 Iowa, 406; *Garland v. Harrington*, 51 N. H. 409; *McCarthy v. Mt. Tecarte L. & W. Co.* 110 Cal. 687; *Chesnut Hill R. Co. v. Chase*, 14 Conn. 123; *Bartlett v. Pearson*, 29 Me. 9; *Cummings v. Fullam*, 13 Vt. 434; *Creighton v. Hyde Park*, 6 Ill. App. 272–274.

The following opinion was filed December 16, 1898:

DODGE, J. The court having reached the conclusion that the defendant the board of regents is not liable beyond the balance of $2,833.69 remaining in its hands and by its answer offered to be paid into court; also, that the defendant *Ferge* is not entitled to any part thereof; there remains the question how the fund should be apportioned among the four assignees, viz., the plaintiffs Skobis Brothers and the defendants Rohde & Patek Brothers, Stephenson & Studeman, and *William Owens*. This question, necessarily involved in directing final judgment, was not argued either in oral arguments or in the printed briefs. We have therefore concluded to order a reargument of the case upon that single question.

By the Court.— Ordered accordingly, that such reargument be set at the foot of the second assignment of the January, 1899, term.

The cause was reargued February 4, 1899.

F. A. Geiger, for the appellant.

For the respondents there were separate briefs by *McElroy & Eschweiler*, attorneys for *Skobis Bros.; Nath. Pereles & Sons*, attorneys for *Rohde & Patek Bros.;* and *R. M. La Follette* and *Gilbert E. Roe*, attorneys for *Owens* and *Stephenson & Studeman;* and the cause was argued orally by *C. F. Hunter*.

The following opinion was filed February 21, 1899:

DODGE, J. 1. The first question to be decided is whether the transactions had by Bentley with these several subcontractors were sufficient, as between themselves, to effect equitable assignments of portions of the fund to which he was to become entitled by the performance of his contracts. "Any transaction between the contracting parties which indicates their intention to pass the beneficial interest from one to the other is sufficient for that purpose." *Chapman v. Plummer*, 36 Wis. 265. "It [the assignment], in the final analysis, all depends on the intention of the parties. If they intended it to be an assignment of the fund, equity will so treat it. In order to constitute an assignment in equity of a debt or chose in action, no particular form is necessary. Any order, writing, or act which makes an appropriation of the fund, amounts to an equitable assignment." *Baillie v. Stephenson*, 95 Wis. 500–502.

The acts themselves are not in much doubt, but the inferences to be drawn from them as to the understanding and purposes of the parties are; but, being doubtful, we yield to the finding of the circuit court that the delivery of the certificates was intended by the parties to be effective as assignments. This conclusion disposes adversely of the claim of the defendant *Ferge*, assignee for benefit of creditors of said Bentley, for he stands in the shoes of Bentley, and can claim no rights which Bentley could not have claimed at the time

of the assignment, February 11, 1897. *Hawks v. Pritzlaff*, 51 Wis. 160; *Pease v. Landauer*, 63 Wis. 20, 26; *S. L. Sheldon Co. v. Mayers*, 81 Wis. 627, 630.

2. The next and much more disputed question is whether or not the board of regents is liable to these assignees, or any of them. The authorities are overwhelming, and almost without dissent, that no assignment of a chose in action can have any effect upon the debtor or fund holder, or interfere with his dealing with the fund, until brought to his notice. *Spain v. Hamilton's Adm'r*, 1 Wall. 604; *Ward v. Morrison*, 25 Vt. 593; *Loomis v. Loomis*, 26 Vt. 198; *Schilling v. Mullen*, 55 Minn. 122; *Mowry v. Crocker*, 6 Wis. 326. The substitution of a new creditor is in derogation of the rights of the debtor, and was strictly prohibited by the ancient rules of the common law. It is only by relaxation of those rules, in deference to the convenience of trade, that such assignments have been recognized at all, and now enable a direct suit where the entire claim is assigned to one assignee, which, formerly in equity, can now be at law by virtue of such statutes as sec. 2605, Stats. 1898. *Nat. Exch. Bank v. McLoon*, 73 Me. 498; *Little v. Portland*, 26 Oreg. 235; *Chapman v. Plummer*, 36 Wis. 262, 266. The fact, however, of such substitution of a new creditor must, in order to make the debtor liable to the assignee, be brought home to the debtor with much exactness and certainty before he has paid the debt. The rule of notice to him is much more stringent than that which may defeat the title of a *purchaser* of a chose in action or of real estate. The latter is free to purchase or refuse to purchase as he chooses, and therefore it is his duty, before acting, to trace out any reasonable doubt and inform himself of the true facts as soon as anything arises to put him on inquiry. But the debtor is not so situated. He must pay to his original creditor when the debt is due, unless he can establish affirmatively that some one else has a better right. The notice to him, therefore, must be of so exact and specific

a character as to convince him that he is no longer liable to such original creditor, and to place in his hands the means of defense against him, or at least the information necessary to interplead the assignee. *Christmas v. Russell*, 14 Wall. 69, 84; *Brady v. Loring*, 70 Ill. App. 191; *In re Tichener*, 35 Beav. 317.

In no case could general information that his creditor was likely to borrow on the credit of the debt, or that he had in other instances borrowed upon it, nor any mere suspicion that he might have made assignment to others, alone place the debtor in the predicament of paying his original creditor, at the peril of being held liable to any one who might prove to be an assignee. The conversation between Bentley and Bashford, in Milwaukee, in which request was made for the issue of architects' certificates to be used in raising money, is claimed to have amounted to notice that Bentley expected to make assignments; but, even conceding such force to it, the regents could not thereby have been charged with such notice of any specific assignments as would hold them liable to an assignee under the rule just stated. Nor would the knowledge, if such they had, that Bentley had assigned other certificates to banks or others.

With reference to an assignment of part only of a fund in the hands of one not a banker nor bound in advance to consent to partial assignments, the weight of authority is in favor of a still more stringent rule in protection of the debtor. While the prohibition of the ancient common law against the assignability of claims, so as to substitute a new creditor, has been relaxed, so that now an assignee of the whole fund may, by virtue of the Code provisions that the party in interest shall sue, maintain an action at law directly against the debtor, the relaxation has not been extended so as to take away the protection of the other rule that a debt cannot, at the will of the creditor, without consent of the debtor, be split up, and several suits maintained thereon,

whether by assignment or otherwise. The debtor has a right to pay his debt *in solido*, and to refuse to be subjected to suits by several claimants; and no notice of an assignment of a part of a debt, no matter how complete in equity as between the assignor and assignee, can destroy this right of the original debtor without his consent. *Mandeville v. Welch*, 5 Wheat. 277; *James v. Newton*, 142 Mass. 366; *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. Rep. 615; *Price v. The Elmbank*, 72 Fed. Rep. 610; *Leonard v. M., K. & T. R. Co.* 68 Mo. App. 48. The question has not been definitely presented in Wisconsin, but the intimation of the previous cases in this court is to the effect that the assent of the debtor is essential to the existence of direct liability to the assignee of part of a fund. *Leonard v. Burgess*, 16 Wis. 41; *Gundry v. Vivian*, 17 Wis. 436; *Pease v. Landauer*, 63 Wis. 20, 28.

Applying this rule to the case at bar, it is obvious that the fund holder, the board of regents, at the time of the final payment to Bentley, was under no liability to any of the assignees, unless to the assignee *Owens* by virtue of a special agreement claimed to exist in his behalf (which will be discussed later), for the reason that there had been no consent by the board to severance of the fund, or to liability to the individual assignees. True, it is apparently claimed by the plaintiffs and other assignees that the transactions between Bashford and Bentley in Milwaukee, before the signing of the written contract, had some such effect; such contention being predicated upon the argument that it was thereby agreed that the architects' certificates to be issued were to be given a sort of currency, to pass from hand to hand as Bentley might choose to use them; and the court finds that it was agreed that they should be issued upon the understanding that Bentley was to use them in raising money. We do not think either the evidence or the finding establishes even an attempted agreement to the extent claimed, as the certificates could well have been "used in raising

money" otherwise than by assignment of the amounts certified to be due therein. The solvency of the fund holder, the regents, was of course beyond question; and the fact of an indebtedness, of which the certificates were some evidence, was a good basis of credit on which Bentley might have borrowed, especially if his reputation for financial integrity was reasonably good, to the contrary of which nothing appears. Whatever may have been the terms of that conversation, however, it constituted no agreement, binding on the board of regents, varying the terms of the written contract formally signed by Bentley and by the chairman, under authority of the board. This defendant is not a mere private corporation, but is an instrument for performing one of the functions of the state government. Its powers are strictly limited by law, and all persons dealing with it have the same knowledge as its own members of the powers which it or any of its officers may exercise. The moneys which it handles are not corporate or private moneys, but moneys of the state of Wisconsin. No authority is shown to exist in Mr. Bashford to enter into any agreement which should modify the written contract the board had authorized. In the absence of such showing, no presumption or intendment can be entertained to support his authority. Further, the evidence discloses beyond dispute that all of the conversation upon which the above finding and argument are predicated took place before the signing of the written contract, and necessarily the latter must be conclusively taken to express the whole terms of the contract between the parties.

The moneys remaining in the hands of the regents, and offered to be paid in court, are more than sufficient to satisfy the claim of *Owens*, and therefore the question whether there was any binding contract with him, giving peculiar rights as against the defendant regents, is not material to this branch of the case. No obligation, duty, or equity, as against

the regents, is shown on behalf of any or all of the assignees which cannot be more than satisfied by the $2,833.69, which they tender into court. The board cannot be held liable, therefore, beyond that balance.

After reaching this point, a reargument was ordered, and had, as to the priorities, if any, between the several assignees in the fund so to be paid into court.

It is claimed by defendants Rohde & Patek Bros. that they are entitled to priority, because they first gave notice to the regents. That notice was, however, immediately repudiated, and they were notified that the regents would pay only to Bentley. *Owens* claims priority both because he gave notice,— which need not be heeded, for the board made no consent to the assignment to him,— and also because of an agreement, which he claims to have had, either that the regents would pay him the amount of his subcontract, or that they guaranteed the payment thereof by Bentley. Both his testimony and the findings are quite ambiguous as to the terms of the agreement claimed to have been made, seemingly asserting both an original undertaking to pay him, and also an agreement to guarantee that Bentley would pay him. Their only support consists in *Owens's* own testimony, from which it appears that Bentley objected to a separate contract for plumbing, because he could not control the time of its performance, whereupon a conversation was had between Mr. Stevens, a member of the board, Riley, Bentley, and *Owens*. *Owens* says: "Then it was fixed that I should simply get the money through Mr. Bentley. I was given to understand that they would see me paid if I would take it through Mr. Bentley. I don't know who made the suggestion that they would fix things that way. It was one or the other. . . . The reason I made the contract with Bentley was because I was assured that I should be paid by the regents. I believe Mr. Stevens said so, though I ain't

sure he said it. I believe it was one of the members of that committee. . . . The understanding was I was to take my money from Bentley."

The resolution adopted by the board awarded the entire contract to Bentley, on condition that he give the preference to *Mr. Owens*, provided *Owens* did the entire plumbing for $3,800; otherwise, Bentley could make any other arrangements therefor. Thereafter *Owens* and Bentley entered into a written contract as follows: "I will furnish material, etc., for $3,800; gas fitting, $250, additional to above. The above proposition is subject to the same conditions as the general contract entered into by the regents and Thomas R. Bentley. Accepted April 22, 1896." (Signed by *Owens* and Bentley.) *Owens's* conduct also is wholly inconsistent with original liability of the board to him. All of his applications for money pending the performance of the work were not to the regents, but to Bentley, who paid him $1,200 at one time, and $800 at another. After obtaining the $1,800 certificate in controversy,— which, it will be observed, was not a promise to pay to any one, but a certificate that that amount of plumbing had been done under the contract,— he insisted on its transfer by Bentley to him. As late as February, he was satisfied with the assurance that payment to Bentley had been ordered and he better see young Bentley, and, when Bentley made assignment for benefit of creditors, *Owens* made proof of his entire claim against his estate.

On the other hand, both Riley and Stevens contradict any such verbal agreement as is testified to, asserting that the transaction was merely an effort to secure for *Owens*, to whom they were apparently friendly, the subcontract for plumbing.

This evidence seems to us to fall far short of establishing any understanding even on *Owens's* part that the board assumed direct liability to him; but, whether that be so or not, the transactions related fail utterly to bind the regents

to any such undertaking as is claimed. The only act done by them was to award the entire contract to Bentley and authorize its signature by the chairman of the executive committee. No verbal explanations or assurances made by individual members could bind this corporation to an agreement either to pay or to guarantee the amount of *Owens's* subcontract, nor subject the public moneys under its control to liability in excess of that authorized by the board.

While there is much conflict as to the rule governing successive assignments of an entire claim, some courts holding that the prior assignment in time is entitled to priority, while others hold that a subsequent assignee for value without notice gains priority by first notifying the fund holder, the holding as to partial assignments is, without much dispute, that notice to the debtor is ineffectual unless he consents — that it imposes upon him no duty or liability to the assignee. *James v. Newton*, 142 Mass. 366; *Pease v. Landauer*, 63 Wis. 20. In the present case, there seems, therefore, to be no superior equity in favor of any of the claimants. The board of regents did not consent to any of the assignments so as to become liable. They did not make any agreement with *Owens* either to pay or guarantee him. None of the assignees is a holder for value, for the assignments were all made to apply on existing debts; and, finally, there is no priority in time, for the assignments and deliveries are all found to have taken place "on or about September 1st."

We conclude, therefore, that the equities of the four assignees are equal, and that upon payment into court by the board of regents of the sum of $2,833.69, as tendered in their answer, judgment should be entered dismissing the complaint as to them, and dividing the fund between Skobis Bros., Rohde & Patek Bros., Stephenson & Studeman, and *William Owens*, in proportion to the architects' certificates held by them respectively. The prayer of defendant *Henry Ferge's* answer should be denied. Appellant will recover its

taxable costs in this court and in the circuit court, to be paid out of the funds in its hands. No costs will be taxed for or against any of the other parties.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in accordance with this opinion.

BROWN, Administrator, Appellant, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

November 28, 1898—February 21, 1899.

Death by wrongful act: For whose benefit action can be maintained: Pleading: Survival of action for injuries to person.

1. The liability created by sec. 4255, Stats. 1898, in case of the death of a person by an actionable injury for which such person could have recovered damages if death had not ensued, is for the benefit of certain relatives of the decedent mentioned in sec. 4256, Stats. 1898, and in default of such relatives there is no liability.
2. In an action for damages under said sections, if the complaint fails to show the then existence of relatives entitled to benefit by the recovery, it is fatally defective.
3. Under sec. 4253, Stats. 1898, actions for injuries to the person survive, though death ensue from the injury.
4. The right of action for an injury to the person which survives under sec. 4253 is separate and distinct from the loss to surviving relatives recoverable under secs. 4255 and 4256.
5. If a person die from the effects of an actionable personal injury, not having received satisfaction for his damages, action therefor for the benefit of his estate may be prosecuted to satisfaction after his death. [Whether such satisfaction in advance of an action under secs. 4255 and 4256, if circumstances exist rendering such latter sections applicable in any event, would be a bar to such action, not decided.]

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

102 137
103 218
104 164
102 137
108 16
102 137
109 431
109 555
102 137
111 [3]487
102 137
[8]44 LRA 579
51 LRA 285n
102 137
115 [1]336
60 LRA 591

Action to recover damages for a personal injury to August Zilmer, deceased, and also damages for his death. The complaint states all formal matters, and, in substance, that on the 29th day of August, 1895, at the incorporated village of Deerfield in this state, at a crossing of defendant's railroad with a public street in such village, August Zilmer was traveling on the street with due care, riding in a wagon drawn by a horse, and while so circumstanced defendant's servants caused one of its locomotives to approach and go onto and over the crossing at an unlawful rate of speed, to wit, forty miles an hour, without in any manner signaling such approach, whereby, without contributory fault of Zilmer, the locomotive struck his horse and wagon, and threw him with great force and violence on the ground, bruising and wounding him upon his head, body, and limbs, thereby causing him to suffer great mental and physical pain, from the effects of which he on the same day died, to the plaintiff's damage in the sum of $5,000. The complaint further stated that the deceased left no wife or father or mother or children, but left some brothers and sisters, and stated facts showing that a pecuniary loss was sustained by them by reason of his wrongful death, to the extent of $5,000. The defendant demurred generally to the complaint, which demurrer was sustained, and from the order accordingly entered this appeal was taken.

For the appellant there were briefs by *Bushnell, Rogers & Hall*, and oral argument by *A. R. Bushnell.*

For the respondent there was a brief by *Fish, Cary, Upham & Black*, and oral argument by *John T. Fish.*

The following opinion was filed December 16, 1898:

MARSHALL, J. Two questions are presented on this appeal: (1) Can brothers and sisters of one wrongfully killed recover damages from the wrongdoer to compensate them for the pecuniary loss thereby sustained? (2) Does a cause

of action for damages to a person, because of an injury from the effects of which death ensues, survive to his administrator for the benefit of his estate? The decision of either of these questions in favor of the appellant must result in a reversal of the order appealed from.

Actions for death losses sustained by surviving relatives are wholly statutory, and therefore, unless clearly thus given, do not exist at all. The subject in this state is covered by secs. 4255, 4256, Stats. 1898, which provide that if the death of a person be caused by the wrongful act of another under such circumstances that if death had not ensued such person could have recovered of such other damages for his injury, such other shall be liable to an action for damages notwithstanding the death, such action to be brought and prosecuted in the name of the personal representative of the deceased person for the benefit of the husband or widow of such person if there be such surviving, otherwise for the benefit of such person's lineal descendants, or, in default of such descendants, such person's lineal ancestors. We are asked to hold that by such statutes the right of action for the wrongful death of a person is conditional only upon the circumstances being such that if death had not ensued the decedent could have proceeded against the wrongdoer for damages. If the statute were susceptible of that construction, in any reasonable view of the language used, and we think it is not, the contrary view has been too long established as its true meaning to leave the matter open to question at this time. In *Woodward v. C. & N. W. R. Co.* 23 Wis. 400, decided thirty years ago, it was held that unless a person named in the statute as entitled to the benefit of a recovery when obtained be shown to be in being by the allegations of the complaint, the calls of the statute are not satisfied and the action for damages for the death cannot be sustained. That is in line with the numerous decisions in this country and England where similar statutes exist, as abun-

dantly appears in the opinion of the learned chief justice in the case cited, and the numerous authorities cited there by counsel. It has never been since questioned successfully in this court, but on the contrary has been repeatedly affirmed. *Topping v. St. Lawrence*, 86 Wis. 526; *Regan v. C., M. & St. P. R. Co.* 51 Wis. 599; *Gores v. Graff*, 77 Wis. 174; *Schmidt v. Menasha W. W. Co.* 99 Wis. 300.

The reasonableness of that construction is fully realized when one considers, as the fact is, that the action for a death loss to a surviving relative is not a right by survivorship to the claim which existed in favor of the injured person in his lifetime. If that right of action exist at all, it is for the benefit of the estate under the statute, to be hereafter considered under the second point made by appellant. The death loss act of the English statute (9 & 10 Vict. 93), commonly called "Lord Campbell's Act," and the various laws of a similar kind that have been modeled after it, gave a new cause of action unknown to the common law, for the benefit of certain designated classes of surviving relatives. Such relatives do not take the cause of action for damages to the deceased by transfer to them by operation of law, or otherwise, but are enabled by statute to recover the pecuniary loss to themselves caused by the wrongful taking off of the decedent, the continuation of whose life would have been beneficial to them. As was said by Mr. Justice ORTON in *Topping v. St. Lawrence*, 86 Wis. 526, the action accrues to the surviving beneficiary mentioned in the statute by reason of the death of the injured person caused by the wrongful act of another. It is strictly not proper to say that it is a cause of action which survives; it is rather a new action by secs. 4255 and 4256, which can be brought, not for the benefit of the estate, but solely for the benefit of the beneficiaries named in the statute.

Counsel's contention is that the liability is made absolute by sec. 4255, and therefore is not limited by the following

section which designates who shall be the beneficiaries. As before indicated, that question has long been foreclosed in this court, contrary to counsel's contention; nevertheless, if the question were now presented for the first time, in view of the fact that the section giving the right is coupled with the section for its enforcement, it would appear to be a very plain proposition that such remedy is exclusive and necessarily limits the right to those for whose benefit it may be enforced, i. e. to the particular beneficiaries named and in their order, that is, husband or widow, if there be such, otherwise lineal descendants, and, in default of such, lineal ancestors.

On the question of whether a cause of action for injury to the person survive to his personal representative in case death ensue therefrom, this court held in the affirmative in *Lehmann v. Farwell*, 95 Wis. 185, construing what is now sec. 4253, Stats. 1898, which provides generally that actions for the recovery of damages to the person shall survive. The subject there received most careful consideration, and no reason is perceived now for changing the ruling there made.

The learned counsel for respondent contend, with much learning, that the section last referred to, and secs. 4255 and 4256 of the statutes, giving a right of action to relatives in certain circumstances specified, should be construed together, so as to limit actions that survive under sec. 4253 to cases where death does not ensue from the injury. That claim has the merit of being supported by decisions elsewhere under similar laws, but, looking only to the language of the statutes, no good reason is perceived for resorting to construction at all to determine their meaning. The language seems too plain to allow that. We have not even good reason for saying, as some courts have, that the statutes were enacted at the same time, or went into effect at the same time, and it is therefore unreasonable to hold that the legislature intended to give two rights of action at the same time

for one injury. The law of this state conferring upon surviving relatives the right to recover their pecuniary loss caused by the wrongful taking off by death of a husband, wife, child, father, or mother, has existed for over forty years, while the law reviving the right, in favor of the personal representatives of a deceased person, to his claims for damages to his person, was not enacted till 1887. But independent of that circumstance, as before observed, the language of the two provisions is plain. They refer to entirely distinct losses recoverable in different rights,— the one in the right of the deceased for the loss occasioned to him; the other in the right of the surviving relatives for the loss to them. Both are dependent on the injury, but only one dependent on the death with surviving relatives to take under the statute. The language of one provision is that "actions for personal injuries shall survive," and of the other, "in case of the death of a person by the wrongful act of another," under certain circumstances named, the wrongdoer "shall be liable to an action for damages notwithstanding the death of the person injured, if the death be caused in this state." The only condition of the right of action in the former case is the existence of the actionable claim for damages at the time of the death of the injured party. The statute creates no new liability, but prevents the lapsing by death of an old one. The only condition of liability under the other provision is the existence of an actionable claim in the right of the injured party at the time of his death and the existence of the beneficiaries mentioned in the statute. The liability of the wrongdoer, while dependent on the condition named, is not on the actionable claim called for to satisfy such condition, but on a new right created by the statute,— the right of the surviving relatives to compensation for the loss which falls upon them. The language of the statutes, when viewed in the light of the evident legislative purpose, is too plain to justify courts in interpolat-

ing into them language not there by necessary implication from the context, in order to make them accord with the ideas of judges as to the best legislative policy. The judicial function, we need not say here, does not extend so far. It calls for a firm adherence to the law as written, if valid, without regard to individual opinions as to its being good or bad. In this we do not intend to suggest that the law in question, as construed here, is a bad law. On the contrary there appears to be much wisdom in providing that a person who wrongfully causes a personal injury to another, shall not profit by that other's death, so far as actual damages go, either to the deceased person or to the wife, husband, or lineal descendants or ancestors of such person.

True, as claimed by the learned counsel for respondent, and before indicated, several courts, for whose judgment we entertain high regard, in construing similar statutes have decided that the right of action to surviving relatives is exclusive, and that the personal injury action that survives under sec. 4253 does not include those where death ensues from the injury. A good example, among others cited in counsel's brief, is *Holton v. Daly*, 106 Ill. 131. That learned court reasons that there is but one ground of liability,— the wrongful act; and as all claims for damages grow out of the one wrong it is unreasonable to say the legislature intended there shall be two causes of action based upon it; that the more reasonable view is that the act making causes of action for personal injuries survive should be considered as referring to a special class of actions, not included in those named in the general provision giving a right of action to surviving relatives; that without that construction there would be a repugnance between the two provisions. The fallacy of that reasoning is easily apparent. True, in the circumstances named, there is but one wrongful act, but that is not the sole ground of action in the right of the deceased or the survivor. It takes the wrongful act and the loss to make

the complete cause of action, and as the loss to the person upon whom the injury is inflicted must be recovered by or in his right, and the loss to the surviving relatives by or in their right, the causes of action are clearly distinct. It does not require, apparently, much clearness of mental perception to discover that if several persons are made to suffer pecuniary loss by one wrongful act, each may very properly have his independent cause of action and remedy for the loss resulting to him, and that, generally, in order to do complete justice, in the absence of some provision for a recovery for the benefit of all and a distribution of the proceeds, separate causes of action must necessarily exist.

The views of the Illinois court accord with the judgment of the supreme court of Kansas. *McCarthy v. C., R. I. & P. R. Co.* 18 Kan. 46; *Eureka v. Merrifield*, 53 Kan. 794; *Martin v. M. P. R. Co.* 58 Kan. 475. It is significant that the former treats the act for the survivorship of the right to recover damages to the deceased for the benefit of his estate as a special provision, and that for the benefit of surviving relatives as a general act, and that, giving them a literal interpretation, they are repugnant to each other in part; while the latter reverses the situation, treating the act of the claim for damages to the deceased as general, and that for the benefit of surviving relatives as special, the latter being intended to take away the right of survivorship for the benefit of the estate, which would otherwise be given by a literal reading of the former provision. The fallacy of both processes of reasoning grows out of a failure to observe the distinction between the wrong and the resulting loss; that though there be but one wrongful act and one physical injury, there may be several persons that suffer distinct losses, some of which are actionable at common law and some actionable dependent on the statute. Justice Brewer, who was a member of the Kansas court at the time the first decision there was rendered, and concurred in it, referring to the

subject when he was later called upon to consider the matter as a member of the Federal bench, in the case of *Hulbert v. Topeka*, reported in 34 Fed. Rep. 510, said, substantially, that he doubted the correctness of his former opinion, and followed it only in deference to the settled judicial policy of Kansas, the cause being one that arose there; that the basis of recovery under the two provisions of law under consideration, the one for the benefit of the estate of the decedent and the other for the benefit of his surviving relatives, are entirely distinct, the former being based on survivorship of the claim of the deceased, taking no note of the pecuniary loss to relatives, and the other on survivorship of relatives mentioned in the statute, taking no note of damages to the decedent; that the latter proceed regardless of whether the death was instantaneous or followed after months of pain and suffering, being damages to relatives by death to be measured by their pecuniary loss caused thereby; while the former is for loss that would otherwise be a permanent injury to the estate itself. For further illustrations of the distinction, the following in Mr. Justice WILSON's opinion in *Needham v. G. T. R. Co.* 38 Vt. 294, is quoted by Justice BREWER: "The principles on which the intestate's cause of action rested at common law are the same, irrespective of the cause of his death." It "died with his person but is revived by the statute in favor of his administrator." It includes "nothing more than his intestate's cause of action. The statute simply revives but does not enlarge the common-law right of the intestate." The provision for surviving relatives "introduced principles wholly unknown to the common law, namely, that the value of a man's life to his wife and next of kin constitutes a part of his estate." "Such damages to the widow and next of kin begin where the damage of the intestate ended, viz. with his death."

The weakness of the theory that the action for injuries to the person, which survive, includes only those not covered

by the statute for the benefit of surviving relatives, is further illustrated by the fact that courts adhering to that view uniformly refer to *Read v. G. E. R. Co.* L. R. 3 Q. B. 555. The decision there is only to the effect that if an injured person have satisfaction of his claim before death, the subsequent death from the injuries does not confer a right of action upon surviving relatives; that such right exists only where there is an injury to a person and there is an existing claim for damages therefor at the time of his death. Justice BLACKBURN, who delivered the opinion, said, in substance, that the proper construction of the statute is that it gives a right of action to certain surviving relatives of a person when death was caused by the wrongful act of another, where he had not received satisfaction in his lifetime, and that to go further would be straining the language of the law. That seems plain. The language of our statute is that liability of the wrongdoer exists where the deceased could have recovered if death had not ensued. That clearly excludes the idea that where the decedent receives satisfaction for his injuries, the conditions requisite to the right of surviving relatives may exist notwithstanding. There is nothing in *Read v. G. E. R. Co.*, in conflict with *Blake v. Midland R. Co.* 10 Eng. Law & Eq. 443, where, in a very instructive opinion by COLERIDGE, J., it is said that Lord Campbell's act does not transfer to the surviving relatives mentioned the claim for damages previously possessed by the deceased, but gives to them an independent cause of action for damages peculiarly incident to their relation to the deceased. The two cases are often cited to opposite views, but are in fact, when correctly understood, in perfect harmony. The one holds that the right of the relatives named in the statutes is separate and distinct from that possessed by the deceased; the other, that the right of the relatives is contingent on the death of the injured person without having satisfied his claim for damages.

With proper regard for the argument of the learned counsel for respondent, we cannot well close this discussion without some review of the decision of the supreme court of Rhode Island in *Lubrano v. Atlantic Mills*, 19 R. I. 129, which is cited to our attention with great confidence. The case expressly holds with the Illinois court and the Kansas court, that the statute giving the right of action to personal representatives of a person wrongfully killed, for the benefit of certain relatives named, is exclusive. The case does not throw any new light on the subject under consideration, except as to the inherent weakness of the reasoning indulged in to support the theory which the distinguished court adopts. *Read v. G. E. R. Co.*, *supra*, is cited without perceiving, apparently, that, as before indicated, it only holds that where the claim of the deceased person is extinguished, one of the conditions requisite to the cause of action for damages under Lord Campbell's act is impossible, therefore statutes on that subject have no office to perform; that it has no bearing on the question of whether, in the absence of such extinguishment, there are two rights or causes of action for distinct and separate losses. Again, the learned court falls into an error heretofore mentioned, in referring to the two statutes as one being general and the other special, and that the two in part refer to the same subject, viewing the liability of the wrongdoer as entire merely because based on a single wrong. As we have seen, each treats of a distinct species of loss, and for that is general. There is no question of repugnancy or implied repeal of one provision by another on the same subject, or the substitution of one right for another, to be considered, if we give effect to the plain reading of the law and not attempt to vary it because of consequences which to some minds may appear to throw unreasonable burdens upon the wrongdoer. It must be presumed that the legislature had all these matters in mind, and from its judgment there is no appeal.

The Rhode Island court, further discussing the subject, speaks of the right of survivorship as a mere remedy given as a substitute for that which existed in the right of the decedent. Here again, there is a confusion between rights and remedies. To say that sec. 4255 of our statutes gives a remedy for the one that at common law lapsed with the death of the decedent, is to say that it gives a new remedy for a pre-existing right. But there was no such pre-existing right of the surviving relatives to recover their loss caused by the wrongful death. The right or cause of action itself is new, and the remedy to enforce it as well, as observed, in effect, in *Topping v. St. Lawrence*, 86 Wis. 526. The court further, in support of its decision, refers to *Needham v G. T. R. Co.* 38 Vt. 300, stating that the Vermont court later, in *Legg v. Britton*, 64 Vt. 652, overruled its former judgment on the subject of whether there were two causes of action in the circumstances under discussion. A careful reading of the opinion in the later Vermont case, discloses the fact that it is there held, in perfect harmony with the early case, that two causes of action exist,—one in the right of the estate, and the other in the right of the surviving relatives where the cause of action of the deceased is not extinguished before his death. The court said that the extinguishment of the cause of action in the right of the deceased was a bar to that in favor of the surviving relatives. There, the action for damages to the injured person was brought in his lifetime and prosecuted to judgment and satisfaction after his death, and the court said that under such circumstances the right of the deceased was extinguished with the same effect as if satisfaction had occurred before death, therefore that the circumstances requisite to the application of the statute, giving the right of action to the widow and next of kin, did not exist. Using substantially the language of the court: there was left no proper office for the act for the benefit of the widow and next of kin to perform.

There are many other cases bearing on the subject before us, but they do not add anything to what has been said, or call for further discussion, so we shall not further extend this opinion by referring to them. We are well satisfied that sec. 4253 preserves for the benefit of the estate of a deceased person the cause of action possessed by him in his lifetime for an injury resulting in his death, and that it is not affected in any way by the other right or cause of action given by secs. 4255 and 4256 to his surviving relatives to recover for the loss sustained by them; that such is the plain meaning of the statutes, and that if the language used were open to construction at all, the view we have adopted is supported by far the better reasoning and the greater weight of authority. The supreme court of Michigan, in *Hurst v. Detroit City R'y*, 84 Mich. 539, quite recently had the same subject under consideration, with the same result at which we have arrived. That court said, in effect, that a pecuniary loss sustained by a surviving relative resulting from a wrongful death, recoverable under the statute, is one thing; and that damages for the injury to the deceased is another; and that a recovery for the former is no bar to an action for the latter.

Of course, there is no question as to whether a recovery on one claim will bar an action for the other; therefore, what is said should not be taken as deciding that question. We have referred to cases holding that a satisfaction of a claim in the right of the estate leaves the statute giving the other right of action no office to perform, merely in support of the position that the two statutes deal with separate and distinct rights.

The complaint demurred to, by sufficient allegations, shows that plaintiff's intestate was injured by actionable negligence of the defendant, and that he lived thereafter some period of time. The length of time he survived the injury is not stated and is not material except as to the damages recov-

erable, and that does not go to the cause of action. *Bancroft v. B. & W. R. Corp.* 11 Allen, 34; *Hollenbeck v. Berkshire R. Co.* 9 Cush. 478; *Tully v. Fitchburg R. Co.* 134 Mass. 499; *Chandler v. N. Y., N. H. & H. R. Co.* 159 Mass. 589; *Corcoran v. B. & A. R. Co.* 133 Mass. 507; *Kellow v. C. I. R. Co.* 68 Iowa, 470, 21 Am. & Eng. R. Cas. 485. Within the principles stated the complaint states one cause of action, and that for the recovery of damages which the deceased sustained and which he might have recovered for had he lived. Therefore the decision of the trial court sustaining the demurrer to the complaint must be reversed.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

The respondent moved for a rehearing, and the following opinion was filed February 21, 1899:

MARSHALL, J. The motion for a rehearing, made on behalf of the respondent, has received careful, tireless, and patient consideration, as did the case when originally considered, notwithstanding some suggestions to the contrary made in the second argument of the distinguished counsel who made such motion. It is not considered that there was any warrant for such suggestions. They had no proper place in counsel's argument. The importance of the case furnished a sufficient excuse for the motion, and counsel's resources for legitimate argument are too well known to warrant the belief that there was any necessity of resorting to other means of enforcing their logic, even by way of emphasis. Calm, fair consideration of legal questions, while not as necessary to the proper performance of the duties of counsel as those of the court, is quite as helpful in the one case as in the other. It would be well to bear that in mind, especially in presenting motions for re-argument. The situation of counsel at such a time, especially where great in-

terests are involved, and the decision disappoints hopes and convictions born of much careful study of a subject, is well suited to test to the uttermost their power of calm consideration and courteous review of reasons and authorities judicially declared to lead to and require the decision objected to. But whether counsel stand successfully such test or not, the duty of the court to carefully and dispassionately consider, and judicially determine, the questions presented, uninfluenced by any other consideration than to discover and pronounce the law correctly, remains the same.

The suggestion of the learned counsel as to the importance of this case and the far-reaching character of the decision rendered is fully appreciated, and was from the start. It is also fully appreciated that the result of the decision will probably be additional labor for this court, but it is not perceived why that can by any possibility change the law. Legislative enactments are to be rigidly enforced within constitutional limitations, according to the legislative will. If courts were permitted to read them so as to minimize, to any degree, judicial labor, or to adapt them to individual notions of judges as to the best governmental policy, it would be very easy to nullify or change the written law so as to defeat the people's will and destroy the very foundation of a government by the people. So the menace of an increase of judicial labor, and the difficulties of administering the law as we have declared it to be, does not appear at all weighty in favor of changing the decision heretofore rendered.

We should say in passing that the suggested difficulties in administering the law, and danger of injustice to defendants, are largely imaginary, and will gradually disappear as we adapt ourselves to the new conditions which the revival statute creates. The trial judge can easily, by proper instructions, limit the recovery in a revived action to the loss actually caused to the deceased prior to his death; and in

the action under sec. 4255, to the pecuniary loss sustained by the surviving relatives entitled to the benefits of that provision. If the two causes of action are joined, the court can readily require the jury to make separate findings as to damages. As the elements entering into each are entirely distinct, it will readily be seen that there is no more danger of a double recovery under such circumstances than in any one of the numerous cases that might be suggested where two causes of action result from a single wrong. The injustice of two recoveries for distinct grievances, suggested by the learned counsel and by some courts that have taken the view pressed upon us, is not perceived. A little dispassionate reflection on the subject, it would seem, would prevent unqualified condemnation of the legislative wisdom that says, if a person be wrongfully injured, the pain and suffering and expenses to him in consequence thereof shall not be lost to his estate by the circumstance of his death from the injury before receiving satisfaction for his damages, even though the damages to his surviving relatives, to satisfy their own grievance, may be recovered.

What has been said sufficiently meets the preliminary observations and reasons given in the argument for the rehearing. We will now endeavor to take up in their order the objections to the decision, relied upon.

It will not be necessary to go over, to any great length, the subjects discussed in the former opinion. As before indicated, they have all been once considered with all the deliberation and care that should characterize the work of a tribunal of last resort, whose judgments must stand as the infallible truth, there being no power under our system by which such judgments can be changed after the brief time for review allowed by the Code shall have expired.

Our attention is called to the rule stated in the opinion of Chief Justice MARSHALL in *Cohens v. Virginia*, 6 Wheat. 264, to the effect that, though general expressions in an opinion

which go beyond the case may be respected, they ought not to control the judgment in a subsequent suit. That proposition is familiar, and is not liable to be forgotten by judges who have been called upon to apply it in their daily work for a series of years. The trouble with the learned counsel's argument is that they apply the rule, as it seems, to everything in a legal opinion not a part of the final conclusion reached,— to what is judicial *dictum* and even to the reasons upon which the decision is based and are essentially a part of it, when that seems necessary to dispose of authorities that are clearly opposed to their contention; and again, treat mere observation made by a judge in writing an opinion by way of illustration or argument, referring to collateral topics for that purpose, as a part of the deliberate judgment of the court, when, if so considered, they support counsel's contention. There are few decisions of any court but that might be successfully attacked if such a method were permissible. What is here said will be borne out, in our judgment, by what follows.

It is conceded by the learned counsel that if we were right as to what was decided in *Lehmann v. Farwell*, 95 Wis. 185, the decision heretofore reached in this case rests on authority. The question there was whether a claim for a personal injury based on actionable negligence is assignable. The court decided that the question turned on whether a cause of action to enforce such a claim survives the death of the original owner; that by the common law the answer must be in the negative, but under sec. 4253, as it now stands, making all causes of action for false imprisonment, assault and battery, or other damages to the person, survivable, all bodily injuries resulting from actionable negligence are included, and therefore the question must be answered in the affirmative. Said Mr. Justice WINSLOW, the statute "includes every action the substantial cause of which is a bodily injury," 'and the language in that regard is too plain to leave any room for rules

of construction to operate.' To support that, the decisions of the Massachusetts court, made under a similar statute adopted in 1842, the first act of its kind in this country, and from which our own was doubtless taken, holding the same, were cited. It needs no discussion to show that the familiar rule stated by Chief Justice MARSHALL, with which the learned counsel prefaced his review of *Lehmann v. Farwell*, has no application to it whatever. The expression, that the survival statute includes every actionable personal injury, and is too plain to that effect to require construction, was not *obiter*,—it was not even judicial *dictum*. It was the very groundwork of the opinion itself, and governs this case beyond reasonable controversy, unless we are to overrule it.

It is a mistaken opinion that nothing is decided in a case except the result arrived at. All the propositions assumed by the court to be within the case, and all the questions presented and considered, and deliberately decided by the court, leading up to the final conclusion reached, are as effectually passed upon as the ultimate questions solved. *Trustees of School Dist. v. Stocker*, 42 N. J. Law, 115. The judgment is authority upon all points assumed to be within the issues which the record shows the court deliberately considered and decided in reaching it. *Quackenbush v. W. & M. R. Co.* 71 Wis. 472; *Pray v. Hegeman*, 98 N. Y. 351. Nothing is *obiter*, strictly so called, except matters not within the questions presented—mere statements or observations by the judge in writing the opinion, the result of turning aside for the time to some collateral matter by way of illustration. *Buchner v. C., M. & N. W. R. Co.* 60 Wis. 264; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47; *Michael v. Morey*, 26 Md. 239; *Clark v. Thomas*, 60 Tenn. 419; *State ex rel. Nourse v. Clarke*, 3 Nev. 566; *Marbury v. Madison*, 1 Cranch, 137. The test of what is *obiter*, by means of which counsel confidently brush aside the decisions of this court on the very point at issue, and the deliberate decisions of many other

courts on the same point or on questions essentially involved, was pressed upon our attention in *Buchner v. C., M. & N. W. R. Co., supra*, was there fully considered, and was rejected. A study of the opinion in that case, written by the present chief justice, is commended as the most effectual remedy for the mistaken notion, not only that a decision is not authority except upon the very point necessary to it, but that *obiter* is to be rejected, always, as entirely without authority. The opinion quotes the rigorous rule by which counsel test authorities fatal to their contention; then the observation of an eminent text writer, whose writings stand as authority in every country where the common law to any extent prevails, that "it is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately decided by the court, as if the decision had hung upon but one point," and adds: "Such *dictum*, if *dictum* it is, should be regarded as 'judicial *dictum*,' in contradistinction to mere *obiter dictum*,— that is, an expression originating with the judge alone, while passing, by the way, in writing his opinion, as an argument or illustration drawn from some collateral question." And further adds that even such expressions are by no means to be rejected as not entitled to be regarded at all; that while they are not binding, they are not without authority; neither is their use reprehensible, as evidenced by the fact that some of the most sacred canons of the common law have their origin in the mere *dicta* of judges.

At this point a suggestion should be noticed, that in considering sec. 4253 we overlooked the familiar rule of "*Noscitur a sociis.*" *Hiner v. Fond du Lac*, 71 Wis. 82, where there is an intimation that such maxim may play an important part in determining the meaning of the statute under consideration, is referred to. Why the discovery of such a

serious omission in this case, and not in *Lehmann v. Farwell*, 95 Wis. 185, where the statute was first considered and its meaning judicially determined, or in the multitude of cases in other courts where similar statutes were construed, in none of which was it supposed that the rule was applicable! That is not easily comprehended. The maxim "*Noscitur a sociis*" is not a rule of interpretation by which the meaning of one word or designation, or that of several such, used in close connection, governs in determining the meaning of other words or designations used in the same connection. You may know a person by the company he keeps. You may know the meaning of a term by its associates,—what precedes and what follows it. When? Not in every case; but when not apparent from the language itself. It is a rule of construction to be resorted to where there is use for construction, not otherwise. The court said in *Lehmann v. Farwell* that the statute is too plain to admit of construction, hence no rule to that end has any application. The latter familiar rule was evidently not in mind when it occurred that, through forgetfulness in writing the former opinion, the maxim "*Noscitur a sociis*" was overlooked. To seek to apply it in determining the meaning of the statute under consideration, in view of the fact that similar statutes have existed in other states for nearly half a century, and been universally supposed to cover injuries from actionable negligence, and thereby reach a different conclusion, would be what might be called judicial recklessness.

The idea that our statute (sec. 4255) does not grant a new right of action, but continues an old one, with different beneficiaries and different rules for assessing damages, is urged as correct with such confidence that we are called upon to go over the subject anew. No attempt will be made to harmonize all the conflicting observations found in decisions elsewhere regarding the nature of Lord Campbell's act. That cannot be done, and it is not necessary, for most of the

conflicts will disappear as one applies judicial observations to the particular facts in regard to which they were made. We said in the former opinion that the view that the statute for the benefit of surviving relatives confers a new right of action for a grievance separate and distinct from that of the injured person, is supported by the better reasoning and the greater weight of authority. That is adhered to, and it is considered that what follows leaves little or no room for reasonable controversy as to its soundness, if reliance can be placed upon the evident purpose of the statute or authorities elsewhere. It is suggested that the conclusion was reached by illogical reasoning based upon *obiter* observations in judicial decisions. We will consider that.

We said that the cause of action of the injured party, which survives, is separate and distinct from the cause of action in favor of surviving relatives under sec. 4255; that a cause of action unsatisfied at the death of the injured party, for compensation for his injuries, is a condition of the operation of such section so as to give a right of action to the survivors therein named; that the extinguishment of the primary cause of action leaves the statute with no office to perform; that in the absence of such extinguishment there are two rights or causes of action for distinct and separate losses. That was supposed to be supported by numerous authorities cited in the opinion, and it does not seem to have occurred to the courts where such decisions were rendered that the reasoning was illogical or the conclusion arrived at a *non sequitur*. That characterization was made of the reasoning and conclusion referred to. How one can draw from such reasoning and conclusion the idea that the premises reasoned from contemplated the existence of two causes of action before the death of the injured party, and that the idea expressed was that the satisfaction of one of such existing causes of action satisfied the other, as counsel seems to have assumed in designating the conclusion reached as a *non seq-*

uitur, is not perceived. It seems perfectly clear that the idea expressed was, that before the death of the injured party there is but one cause of action; that if that be not extinguished before such death, by the operation of sec. 4255 there may be another cause of action; that while before the death there can be but one such cause, if that survive there may be two. The learned counsel evidently forgot for the moment that the reasoning, though clothed in the language of the writer of the opinion, was based on the same premises, and proceeded by the same mental process, with language definite and clear, to the same conclusion as that in the opinion of Justice COLERIDGE in *Blake v. Midland R. Co.* 10 Eng. Law & Eq. 443; Justice BREWER in *Hulbert v. Topeka*, 34 Fed. Rep. 510; Justice WILSON in *Needham v. G. T. R. Co.* 38 Vt. 294, and many others in numerous opinions in cases cited, and still others that will be cited in this opinion, which, on account of counsel's labor, must be assumed not to have escaped their notice.

Our attention is again called to *Read v. G. E. R. Co.* L. R. 3 Q. B. 555, decided in 1868, and *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357, in support of the continuation of the old cause of action theory The question in both cases was, Does the satisfaction of the claim of the injured party in his lifetime leave Lord Campbell's act still applicable to the situation created by the death of such party? The nature of the statute otherwise, particularly its proper construction in connection with a statute preserving, for the benefit of the estate, the common-law right of action for damages to the injured person, was not thought of. What is said as to the statutory right not being new, but a right conferred in place of an old right, is much nearer pure *obiter* than what is called such in the argument on the motion for rehearing in reviewing decisions cited by this court as authority. In neither of the cases is *Blake v. Midland R. Co.*, *supra*, decided in 1852, referred to, where the exact nature of the

statutory action was considered, and, in the learned opinion given by Justice COLERIDGE, said to be a new right and not a right by transfer or continuation of the claim of the deceased, which opinion has been referred to as an authority in many courts and by many text writers since that time. "The statute does not," said Justice COLERIDGE, "transfer the right of action of the deceased to his representatives, but gives to them a totally new right on different principles." The three cases are, really, in perfect harmony when rightly understood. On the one hand it is said Lord Campbell's act is in the nature of a survival statute and does not confer a new right. That is true in the sense the English court doubtless understood its own language; that is, that the compensation to surviving relatives was conferred in place of that of the injured person, which, by the common law, was extinguished by death. On the other hand, it is said Lord Campbell's act confers an entirely new right, which, too, is obviously true in the sense that it is a right of recovery by different persons, for different losses, on different principles than were known to the common law. That there is any such material variance between the two ideas as courts in some jurisdictions have discovered and assigned as a justification for holding that plain language in a legislative act, making survivable all claims based on actionable negligence, does not mean that but something else, is not perceived. LUSH, J., said in *Read v. G. E. R. Co.*, *supra*, that it was not the intention of the English statute to make the wrongdoer pay twice for the same injury, so the right was there spoken of as not new and independent, but a right in substitution for the lapsed right. That does not conflict with the other idea that none of the elements of damage, of the right which lapsed by common-law rules, are transferred by the statute to the beneficiaries therein named, and in that sense that the right conferred by statute is new. Therefore, the purpose of Lord Campbell's act was

not to make the wrongdoer pay damages twice for the same wrong; it was to give to the surviving relatives a right on condition. That condition, in case of a survival of the right of action, which fails by the common law, exists nevertheless; and if the original inducement for the granting of the new right be removed by preserving the old right under another statute, that does not by any means affect the situation, for a sufficient inducement is yet left to uphold the statutory right.

That we have expressed correctly the views of the English courts is abundantly borne out by numerous cases, some decided before and some after *Griffiths v. Earl of Dudley*, not before cited, including a very recent case passing directly on the question, which was not before us when the previous opinion was prepared and which has evidently not received the attention of respondent's counsel. *Leggott v. G. N. R. Co.* (1876), 1 Q. B. Div. 599; *Bradshaw v. L. & Y. R. Co.* (1875), L. R. 10 C. P. 189; *Barnett v. Lucas* (1872), 6 Ir. R. C. L. 247; *Robinson v. C. P. R. Co.* [1892], App. Cas. 481; *Canadian Pac. R. Co. v. Robinson*, 19 C. S. C. 292; *Seward v. Vera Cruz*, 10 App. Cas. 59; *Pym v. G. N. R. Co.* 4 Best & S. 396.

In *Leggott v. G. N. R. Co.* the question was, Does a recovery under Lord Campbell's act preclude a recovery for the benefit of the estate, of damages to the injured person?—the precise question in this case. The affirmative, unless barred by a recovery under Lord Campbell's act, was conceded for the purposes of the case, though the rule generally as to that was otherwise. The direct question left was the one indicated, namely, Does a recovery after death in one right bar a recovery in the other? And on that the court decided in the negative. QUAIN, J., in deciding the case said, the two actions are entirely different things, one for the loss the estate has suffered and the other under Lord Campbell's act, which "enables an action to be brought in

a case where it could not have been brought before that act, namely, when the man has suffered a personal injury and dies in consequence. After his death, before Lord Campbell's act, no such action could have been maintained, because the death destroyed it. It fell with the life of the individual injured. Now Lord Campbell's act gives an entirely new action, not an action connected with the estate of the deceased in the slightest degree, and the damages recoverable in it would be no part of the estate of the deceased. . . . I therefore feel clear upon the point that these actions are not brought in the same right, and that, therefore, the finding in the one does not constitute an estoppel in the other."

If the foregoing leaves doubt in the minds of the most skeptical, as to the position of the English courts, it will be removed by *Robinson v. C. P. R. Co.*, decided by the House of Lords in 1892. That is probably the most recent expression of such courts on the subject. The case arose in Canada. The statute is similar to our sec. 4255, except it requires, as a condition of its operation, death of the injured person without having satisfied his claim. The word "satisfied" does not occur in our statute, but words equivalent so far as relates to the extinguishment of the claim. The Canadian act further provides that the beneficiary may bring the action direct. There is a limitation of the right of the injured person to commence an action to enforce his claim for damages, to one year after the happening of his injury. In the given case the period was allowed to lapse and death then occurred. Action was then commenced to enforce the statutory liability to surviving relatives. The loss by prescription of the primary claim was urged in bar of the statutory right. The Canadian supreme court sustained that, and by special leave the cause was carried to the House of Lords where, all the members of the privy council who heard it concurring, Lords WATSON, MACNAGHTEN, MORRIS, HANNEN,

SHAND and SIR RICHARD COUCH, the judgment of the lower court was reversed upon the ground that the right of action of surviving relatives, contingent on the death of the injured person without having satisfied his claim, is a new and independent right which vests on the happening of the contingency mentioned in the statute; and that such contingency is death from the negligent injury without the injured party having *satisfied his claim;* that an extinguishment of such claim by prescription is not the *satisfaction thereof* contemplated by the act, which requires the active participation of the injured party, and is not satisfaction by mere operation of law. There was no difference of opinion between the last decision and the one reversed, except as to the scope of the word "satisfied" used in the Canadian act. Both courts held that the statutory action was to enforce a new right. Justice STRONG, in delivering the opinion of the lower court, said: "It has been determined in England that the action under Lord Campbell's act is not the same action as that which the deceased person would himself have had at common law if he had survived, but a new action given by statute." Again he said: "As I have said before, I am of the opinion that the action, being of the same nature, and indeed the same action in all respects, as that conferred by Lord Campbell's act, it must, as an action on that statute is considered in England, be deemed to be a new action, but still a new action dependent on the condition that the action of the deceased had not, at the time of his death, been barred or extinguished." With this we rest the subject under discussion as to the holdings of the English courts.

In support of what was formerly said, that the great weight of authority in this country is in favor of the doctrine that there may be two independent causes of action for distinct losses for a single injury, in the circumstances presented by this case, the following additional authorities are referred to: *Safford v. Drew*, 3 Duer, 627; *Chicago v.*

Major, 18 Ill. 349; *Davis v. Railway*, 53 Ark. 117; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Hedrick v. Ilwaco R. & N. Co.* 4 Wash. 400; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693; *Connors v. B., C. R. & N. R. Co.* 71 Iowa, 490; *Putman v. S. P. R. Co.* 21 Oreg. 230; *Mulchahey v. Wash. C. W. Co.* 145 Mass. 281; *Belding v. B. H. & Ft. P. R. Co.* 3 S. Dak. 369; *Hamilton v. M. L. & T. R. & S. Co.* 42 La. Ann. 824. They are all to the effect that the right under statutes similar to our sec. 4255 is new and independent, subject only to the conditions therein named, and that if the primary cause of action survive, both may be enforced, and at the same time. Said DENIO, J., in *Whitford v. Panama R. Co., supra*, speaking of a situation where there was no survival statute: "At common law the right of action for damages on account of bodily injuries, which belonged to the deceased while he lived, was extinguished by his death. The statute does not profess to revive that cause of action in favor of the executor or administrator. The compensation for bodily injuries remains extinct, but a new grievance of a distinct nature, namely, the deprivation suffered by the wife or children or other relatives, of their natural support and protection, arises upon his death and is made the subject of a new cause of action in favor of those surviving relatives, though prosecuted in point of fact by the executor or administrator."

In *Davis v. Railway, supra*, the court by COCKRILL, C. J., speaking of statutes similar to our secs. 4255 and 4253, said: "The English rule, which is commonly followed by the courts of the states whose statutes embody the provisions of Lord Campbell's act, is that the right of action, given by the latter statute to the personal representative of one whose death has been caused by the default of another, is created by the statute and is not a continuation of the right of action which the deceased had in his lifetime, although the new right arises only by preserving the cause of action which was in the de-

ceased. If the deceased never had a cause of action, none accrues to his representative or next of kin. The right which accrued to the deceased revives to the administrator by virtue of the statute [our sec. 4253]. The newly created right [our sec. 4255] results from, and accrues on, the death of the injured party. Both actions are prosecuted in the name of the personal representative and may proceed *pari passu* without a recovery in the one having the effect of barring a recovery in the other. The suits are prosecuted in different rights and the damages are given upon different principles to compensate different injuries. One is for the loss sustained by the estate and for the suffering from the personal injury in the lifetime of the decedent, the recovery of which goes to the benefit of decedent's creditors if there are any; the other takes no account of the wrong done to the decedent, but is for the pecuniary loss to the next of kin occasioned by the death alone. The death is the end of the period of recovery in one case and the beginning in the other. In one case the administrator sues as legal representative of the estate for what belonged to the deceased, in the other he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them."

Further quotation from opinions would only unnecessarily prolong this opinion. Those given are in line with the other decisions cited. It is quite likely that the lapsing of the cause of action in favor of an injured party by his death, according to the rule of the common law, was the inducement for the passage of Lord Campbell's act,— the very bottom of it, as said in *Hecht v. O. & M. R. Co.* 132 Ind. 507, and from that we find some judges regarding the new cause of action as a continuation of the old, and others holding that the cause of action under the statute is an entirely different cause of action for the benefit of different persons, recoverable in a different right, and including entirely different elements of damage. That the actual loss sustained by the

surviving relatives was ample inducement for the passage of the act for their benefit, and that, in providing for the survival of the cause of action of the injured party for the benefit of the estate, it was so deemed, is too clear from the unmistakable language used to admit of a contrary view. We leave this branch of the subject, suggesting, in closing, that our statutes are substantially the same as those of Massachusetts, so long back as 1842, the survival statute there having been adopted at that date as before indicated. The decisions which subsequently followed, construing such statutes, are all in accordance with the conclusion we have reached.

We proceed now to show that what the learned counsel was pleased to call loose talk and *obiter* in opinions of other courts cited in our former opinion, was the deliberate judicial determination of such courts, or such judicial *dicta* as should be regarded as authority on the subjects treated.

We referred to the language of Justice BREWER in pronouncing judgment in the United States circuit court for the district of Kansas, in *Hulbert v. Topeka*, 34 Fed. Rep. 510. Counsel call that *obiter*, and suggest that the justice's idea was based on *obiter* observations of other courts. *Needham v. G. T. R. Co.* 38 Vt. 294; and *Blake v. Midland R. Co.* 10 Eng. Law & Eq. 443, were cited by Justice BREWER. As to the English decision sufficient has already been said. Reference is had to that at this point. Justice BREWER was called upon to judicially consider what the situation was under the Kansas statutes, which are similar to ours, in circumstances similar to those we have in this case. As a member of the supreme court of Kansas he had participated in a decision to the effect that if death ensue from an injury no cause of action for the benefit of the estate survives; that the right of action to the surviving relatives is exclusive. As an original proposition the learned judge clearly indicated that he deemed such decision wrong, but that it was

binding on the federal court in a case arising in Kansas. His expressions of opinion were properly made in the case, and undoubtedly such as he felt bound to make, in order that the court might not be embarrassed by the decision rendered, in the event of a case being thereafter presented where the court would be free to decide according to its judgment of the law, unbridled by the decision of some other court. What was said should be treated with more deference than loose talk. So far as other courts are concerned, it is entitled to consideration quite equal with the Kansas decision to which it refers.

Now a few words in regard to the Vermont case, *Needham v. G. T. R. Co.* 38 Vt. 294, which will be considered in the light of *Legg v. Britton*, 64 Vt. 652. What is said in the former on the subject before us, in the argument for rehearing here is called *obiter* and said to have been disapproved as such in the later case. True, the question of whether the right of action to surviving relatives is a new and independent right, and whether the right of the deceased may survive and under any circumstances the two rights be enforced independent of each other, was not necessarily decided in the *Needham Case;* yet the subject was considered, was unquestionably presented by counsel on both sides, was supposed at the time to be a question proper for determination, and was deliberately determined. As we have before shown, what was said in reaching that determination is not *obiter*. It is at least judicial *dictum*. The case has been regarded as authority by courts and text writers generally. With but few exceptions it has been given all the force of an adjudication by the court on the very point referred to. Of course it was not controlling on the Vermont court, neither would it be here, even if the case had depended on the question. It was not discredited, but rather was affirmed, in the subsequent decision in *Legg v. Britton*. All there said is that the language of the for-

mer decision, on the subject here discussed, was not controlling, because the question was not necessarily decided in reaching the final conclusion on the point at issue in the case. There is no intimation that the point was not deliberately passed upon, or but that what was said in regard to it was entitled to respect. The idea expressed was that the court was free to consider the subject in the subsequent case as an original question, not disregarding, however, as without authority, the early case. After reaching that conclusion the question was considered anew, and a result reached, as said in our former opinion, substantially the same as before. Chief Justice Ross, who delivered the opinion, met the contention respondent supports here, by saying, in substance, that the statutes conferred separate and distinct rights, one by survival and the other a new right dependent on conditions mentioned in the statute. "In conferring this new right of recovery," said the chief justice, "for the same wrongful act, the legislature could place such limitations upon it as it judged expedient. . . . The same wrongful act frequently furnishes two independent rights of recovery, as in the case of an injury to the wife, or an injury to a servant. . . . Hence whether the damages recovered, if two actions are given, may to some trifling extent be double, or whether the same injury sometimes gives two independent legal rights of recovery, throws very little light upon the intention of the legislature in passing the act of 1849 [the survival statute]. A wrongful injury resulting in the death of the person injured may work serious loss and damage to him while living, and to his estate, and at the same time deprive his widow and next of kin of what he would have earned and saved but for the injury." There is nothing new in the decision. It is in perfect harmony with *Needham v. G. T. R. Co.*, which, instead of being considered overruled, should be considered as affirmed; and so it is considered by other courts that have reviewed the sub-

ject. The case is referred to by RAPALLO, J., in *Littlewood v. New York*, 89 N. Y. 24, as being the necessary result of a situation where there is a statute reviving the cause of action of the injured person in favor of his estate, and a statute conferring a cause of action upon his surviving relatives.

A word is required in regard to *Hurst v. Detroit City R'y*, 84 Mich. 539, wherein it is said that the cause of action which survives is a separate thing from the new cause of action given to surviving relatives under the statute. Counsel quotes the language of Justice LONG in that case, and follows with the observation that it needs no argument to show that it is pure *obiter*. The miscalled *obiter* states one of the principal reasons given by the court for the conclusion finally reached, and is by no means *obiter* within the proper significance of the term, as we have before remarked. Instead of the later case of *Sweetland v. C. & G. T. R. Co.* (Mich.), 75 N. W. Rep. 1066, to which our attention was earnestly invited, changing the rule of the *Hurst Case*, it stands as a clear affirmance of it. The two cases, together, are very much in the situation of the two Vermont cases. If the first, by itself, is not to be regarded as a clear adjudication upon the point under discussion, it should be so regarded in connection with the affirmance of the principle in the later case. True, Justice LONG, Justice GRANT concurring, said that the language of his former opinion was *obiter*, but it was not such within the rule stated in this opinion, and was not so considered by a majority of the Michigan court. The opinion of the court, given by Mr. Justice GRANT, is to the effect that no cause of action accrued to the injured person in the absence of conscious existence after the injury; that there was no evidence warranting a finding that there was such conscious existence; hence the recovery of damages to the deceased was reversed. Justice MONTGOMERY dissented because, in his judgment, the question of

conscious existence was for the jury on the evidence. Justice HOOKER dissented because, in his judgment, life after the injury was all that was necessary to a survival of the cause of action. On the whole, how anything can be seen in the case to weaken what was said in the *Hurst Case* is not understood. True, the court was divided on the question, but the majority of the justices held to the doctrine that the cause of action of the injured person is not lost by his death. That seems plain beyond reasonable controversy.

We now come to a suggestion that this court has expressly decided that in case of death from actionable negligence no cause of action survives. At this point the signification of the term "*obiter dictum*" suddenly changes, as it seems. Formerly everything was included not necessary to the conclusion reached, but when *Ean v. C., M. & St. P. R. Co.* 95 Wis. 69, is reached, an observation regarding the subject beyond the case,—something far less entitled to weight than those mere general expressions based on correct premises but beyond the case, covered by the maxim to which Chief Justice MARSHALL alluded in *Cohens v. Virginia*, 6 Wheat. 264, to which counsel referred in the opening, as the test to be applied to the authorities cited by this court, a statement made in passing regarding an outside and not even collateral topic, the purest kind of *obiter* and worse, because the premises upon which it was based omitted the change in the statute regarding the revival of actions, which varied the whole situation, and had not theretofore been passed upon by this court as affecting negligent injuries,—is cited to us as the deliberate judgment of the court on the very point covered by the observation. The question was, If death happened to an employee from the negligence of a co-employee under such circumstances that, had death not ensued, he would have had, by statute, a cause of action against the common employer to recover damages for his injury, may surviving relatives recover their loss under sec. 4255? That

was the sole question considered and decided. Sec. 4253, as it now exists, was not thought of, nor was it in any way involved, even collaterally. In making the observation, decisions were in mind made before the change in the statute in regard to the survival of causes of action for injuries to the person. All that is so obvious, even by a casual reading of the case, that it is not seen why it was cited to our attention as authority, especially in view of *Lehmann v. Farwell*, subsequently decided, where the survival statute was fully considered and it was said that it covered every cause of action for a bodily injury based on actionable negligence, and in view of the further fact that we have heretofore said in this case that the court decided that way in the *Lehmann Case*, and that it rules here. There are many cases where a contention regarding what has been decided is justifiable, but when once made and considered, and the court deliberately passes judgment as to what it before decided, that at least should set the matter at rest.

There are some references, made in the argument for a rehearing, to statutes of other states and decisions under them. That field was covered in the former opinion. It was recognized that those decisions, and some others, are in conflict with our conclusions. No reason is perceived why that can have any greater weight now than before, or why we should again consider them.

We have now referred point by point to every suggestion found in the argument in support of the motion for a rehearing, and have treated anew those considered of importance, with as much care as if the subject were before us for the first time. Notwithstanding the result reached is the same as before, the motion and this opinion upon it will add strength and stability to the judicial declaration of the law originally made. The labor of counsel for respondent has not been without good results. It has placed before us all suggestions, liable to occur to members of the profession,

why a different result should have been reached. The court has been enabled thereby to consider such suggestions and pass upon them as a part of this case, instead of their being left for consideration in future cases. That adds to the authority of a decision, and may rightly be considered fortunate.

To recapitulate why the motion for a rehearing should be denied, notwithstanding the reasons urged to the contrary:

(1) The statute (sec. 4253) we were called upon to construe is too plain to admit of any other construction than that which the ordinary meaning of the words suggests.

(2) The statute is not open to construction in this case, because the subject was fully covered in *Lehmann v. Farwell.*

(3) The suggestion that the maxim "*Noscitur a sociis*" should be applied to the statute cannot be adopted, because a rule for construction is not applicable where there is no use for construction.

(4) The contention that the illustration used in the former opinion, to make apparent the false theory drawn by some courts from the English decisions, is illogical and involved a *non sequitur*, is based on a misconception of the premises on which the conclusion was based.

(5) The contention that language in judicial opinions, cited in support of the decision, are *obiter* expressions, is based on a misconception of the cases where such opinions were given, and what is properly considered *obiter* in a judicial decision.

(6) The assumed conflict in English decisions as to the character of Lord Campbell's act, is not there when they are viewed from the situations of the judges who delivered the opinions.

(7) If the conflict mentioned does exist, that does not change the situation where the legislative purpose is plain to preserve the cause of action of the injured person without prejudice to the cause of action to surviving relatives.

(8) The imagined menace of a double recovery in the sit-

uation as we find it, does not exist in fact, as the damages in one right are limited to the loss which accrues to the injured person before death, and the damages in the other to the pecuniary loss of surviving relatives, as before the survival statute. The two rights in no way overlap each other.

By the Court.— The motion for a rehearing is denied.

WALSH and others, Plaintiffs in error, vs. FISHER, Defendant in error.

102 172
h109 181

102 172
s43 LRA 810
49 LRA 562n
53 LRA 681n
53 LRA 880n

December 17, 1898 — February 21, 1899.

Master and servant: Entire contract: Quitting work: Threats of violence by strikers: Recovery of wages: Liquidated damages: Instructions to jury.

1. No recovery can be had for services under an entire contract where the employee voluntarily abandons the work, without valid excuse, before the end of the stipulated time.
2. In an action to recover for the services of an employee who had quit work in breach of his contract, the evidence would have justified a finding either that he quit pursuant to an agreement with others to strike or that he quit because of a justifiable fear of bodily violence from the strikers. The court was asked to instruct that if he left for the former reason there could be no recovery. *Held*, that it was error to modify such instruction by adding the words: "That is, if that was the reason he quit, and the danger or apparent danger was not such that a man of ordinary nerve would have refused to go on with the work, your verdict will be for defendants."
3. One employed for a stipulated time, if excused in leaving sooner by reason of threats of strikers to do him bodily harm, can recover only the value of his services after deducting the damages, if any, suffered by the employer by reason of the breach of the entire contract.
4. Contractors for the loading and unloading of vessels and cars upon docks, who had given bond for prompt performance, stipulated in a written agreement with their employees that for a breach of such agreement by the latter in quitting the service the employer might

retain, as liquidated damages, any wages then earned by the employee quitting, not exceeding fifteen days' wages in all. *Held*, that such stipulation was justified, and that the amount so to be retained should be regarded as liquidated damages and not a penalty.

ERROR to review a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

This was an action to recover $25.50, for fifteen days' personal services rendered by one McKillop to the plaintiffs in error in June and July, 1896, the claim having been assigned by McKillop to *Mrs. Fisher*, the defendant in error. The answer, after a general denial, contained a counterclaim, alleging that McKillop was employed under an entire contract for the season of 1896, and that he breached said contract without cause, and claimed damages for such breach. On the trial it appeared that the plaintiffs in error, as copartners, had entered into a contract with various railroad and steamboat companies for the loading and unloading of vessels and cars upon some of the docks at West Superior for the season of 1896, and had given bond for the prompt performance of such contract in a considerable sum. In order to perform this work, two classes of men were employed. One class, to which McKillop, *Mrs. Fisher's* assignor, belonged, were known as day men, who were regularly employed under a contract which stipulated that they should work throughout the season of 1896, and should receive pay at a stipulated rate per day for every working day, whether work was provided for them or not. Of this class there were about eighty men. The other class, known as hourly men, were employed casually, as the occasion arose, and paid by the hour for the time they in fact worked. Of these, the defendants had employed at times some 300. McKillop, in common with the other day men, had entered into a written agreement of employment, which, in addition to the terms above mentioned, provided several ways in

which it might be terminated; among others, the following: First, by first party or his agents discharging second party for any violation of this agreement in any respect; third, by the neglect, refusal, or inability of the second party at any time to obey the orders of the first party or his foreman, or to perform a fair and reasonable day's work; fourth, by the failure of the second party to perform any agreement therein. It further provided that, in case of termination for either of the above-mentioned causes, the first party might retain any wages then earned by the second party, not exceeding fifteen days' wages in all, to his own use, as and for liquidated damages for the breach thereof, which said sum was agreed to be the ascertained damages for such termination and breach, and a fair and full compensation therefor. It was also provided that payment should be made on the fifteenth of each month for the work done during the preceding month.

McKillop knew or had heard when he signed the contract that the plaintiffs in error had contracted with railroad and steamship companies as aforesaid, and were under bonds; that a large force was required to carry out their contracts; that boats and cars were liable to come in at all times of the day or night, and would have to be loaded or unloaded; and that it required a few experienced men to work with the inexperienced ones to safely and speedily conduct the work.

It appears by the evidence that on the evening of the 6th of July, 1896, the so-called hourly men quit in a body, or "struck," demanding an increase of wages; and that the 'Longshoresmen Union, on the following day, July 7th, discussed the question of that strike, and assumed control and jurisdiction of it for the hourly men, and served on the plaintiffs in error a notice signed by their officers, demanding an increase of pay for the hourly men. It appears that McKillop had for something like a year been a member of

the 'Longshoresmen Union, but had dropped out of active connection with it, and did not know that the union was having anything to do with the strike of the hourly men. The day men, continuing to work during the 7th and 8th of July, were interfered with by squads of the striking hourly men, and threatened with serious violence unless they also quit work. This interference did not occur at the docks where they were at work, but upon the streets, as they were going to and from their work. These threats were of personal injury, and, as McKillop and others of the day men testified, put them in serious fear; so that on the evening of July 8th a considerable number of the day men, including McKillop, attended a meeting of the 'Longshoresmen Union, at which it was demanded that the day men also quit work, unless wages were raised both for the hourly and day men, and that such quitting take place at noon of the following day, unless the demands were acceded to; and a resolution was offered and passed that the day men must quit accordingly, unless such concessions were made. It does not appear that McKillop voted on this resolution, nor whether he entered into any agreement other than that which may be inferred from the fact that he was a member of the union, and hence impliedly bound to abide its decisions. McKillop testifies that he was again interfered with on the morning of the 9th on his way to work, by seven or eight of the strikers; and at noon he quit work, as did also all of the day men who belonged to the union, the plaintiffs in error having declined to accede to their demands.

McKillop testifies: "I was stopped on my way to work the morning of the day I quit. There were seven or eight of them. They asked me if I was going to quit. I said I didn't think I would. They said, if I didn't quit, they would club me to death; they would murder half of us down there. I said nothing more, but kept on going. I worked until noon that day. On our way home we were met by another

gang, and they told us to stay home that afternoon. I don't know who those men were. I didn't go back to work that afternoon. I was kind of scared of those men down there in the yard. I boarded at the corner of Third street and Banks avenue. I didn't consider it safe at any time after I quit, until the strike was over, for me to go back to work, and for that reason I remained away. I heard of men getting held up and attacked after I quit. I don't know what men they were. They were working for *Mr. Walsh.* I quit because I feared those men I met in going to and from my work would hurt me."

On cross-examination he testified as follows: "It is a fact that the reason I quit was because the rest of the day men quit;" and, further: "I didn't know for sure at noon of July 9th that I was going to quit. I thought everything might be all right when we got home at noon; that is, the strike might be called off, or something. I was thinking that."

After the day men quit, on the 9th of July, the strike continued for some days, the officers of the union exerting themselves to prevent men coming in from St. Paul and Minneapolis to supply the place of the strikers; and the plaintiffs in error were undoubtedly put to great straits and large expense by reason thereof, though they were not allowed on the trial to go into that, it being held that their damages were liquidated by the written contract.

The defendant in error claimed that there was due McKillop, when he quit, fifteen days' wages, which, at the contract price of $1.70, amounted to $25.50, and put in evidence a written assignment to her of all claim against the plaintiffs in error for work, labor, and services done and performed during June, 1896, amounting to $25.50, dated July 24, 1896.

The jury found for the defendant in error, and to reverse the judgment entered thereon, after first moving to set the

verdict aside, as contrary to the evidence, the defendants below brought their writ of error.

A. T. Rock, for the plaintiffs in error.

For the defendant in error there was a brief by *O'Brien & Vaughn*, and oral argument by *P. H. O'Brien*. They argued, *inter alia*, that the plaintiff's assignor having been prevented from fully performing his contract without the fault of either party, could recover for the work done under it upon an implied *assumpsit*. 1 Beach, Modern Law of Contracts, § 228; *Parker v. Macomber*, 17 R. I. 674; *Cutter v. Powell*, 6 Term, 320; *Bream v. Marsh*, 4 Leigh, 21; *Haynes v. Second Baptist Church*, 12 Mo. App. 536; *Carpenter v. Gay*, 12 R. I. 306; *Farrow v. Wilson*, L. R. 4 C. P. 744. A strike of workmen is no excuse for the failure to perform a contract, but where the workmen abandon their work, and by violence and intimidation prevent other employees who are ready and willing to work from doing so, then this ceases to be a strike. *Geismer v. L. S. & M. S. R. Co.* 102 N. Y. 563; 1 Beach, Mod. Law of Cont. § 238; *Pittsburgh, Ft. W. & C. R. Co. v. Hazen*, 84 Ill. 36; *Pittsburgh, C. & St. L. R. Co. v. Hollowell*, 65 Ind. 188; *Lake Shore & M. S. R. Co. v. Bennett*, 6 Am. & Eng. R. Cas. 391; *Indianapolis & St. L. R. Co. v. Juntgen*, 10 Ill. App. 295.

WINSLOW, J. The question which was sharply litigated in this case was whether McKillop quit because of genuine and justifiable fear of serious bodily violence at the hands of the hourly men who had struck, or because of the agreement or resolution of the day men to strike at noon of the 9th of July, unless the demands of the hourly men were acceded to. There was evidence which would justify a finding either way on these propositions. Certainly, there were ample facts which would justify the conclusion that McKillop quit because he choose to abide by the resolution, or, in other words, that he was in fact one of the second set of strikers. If such

were the case, no recovery could be had, because his contract was entire and he voluntarily abandoned his work, without valid excuse, before the end of the stipulated time. *Koplitz v. Powell*, 56 Wis. 671.

This proposition of law was substantially correctly stated in the following instruction, which was offered by the defendant: "You are instructed that if Mr. McKillop left his work, under and pursuant to the agreement of the day men and the hourly men on the night of July 8, 1896,— that is, to quit at noon, July 9th, if defendants did not concede to the proposition submitted to them on July 8th, then plaintiff cannot recover, and your verdict shall be for the defendants."

The court read this instruction to the jury, and added the following words: "That is, if that was the reason he quit, and the danger was not such — that the danger or apparent danger was not such — that the man of ordinary nerve would have refused or declined to go on with the work, your verdict will be for the defendants."

We think that the addition of this limitation to the instruction was error. Irrespective of the statute which requires an instruction to be given as asked or refused in full (R. S. 1878, sec. 2853), we think the plaintiffs in error were certainly entitled to have the instruction which they asked given without dilution or qualification. The proposition was that, if Mr. McKillop quit in pursuance of the agreement to strike, he could not recover, and the jury should have been so informed plainly and directly, without being required to determine, in addition, what would have been the condition of mind of a hypothetical man who perhaps had entered into no agreement to strike. The last clause added a confusing element to a simple proposition, and it was error to attach it to the instruction as asked.

A more important and vital question, however, is yet to be considered. There was a motion to direct a verdict for

the plaintiffs in error, which was overruled and exception taken; and this raises the question whether, in any view of the case, the defendant in error is entitled to recover. It seems to have been assumed upon the trial below, and upon the argument in this court, that, if McKillop was excused in leaving the defendant's service on account of the threats of strikers to do him bodily harm, he can recover for the time of his actual service, without deduction for damages suffered by the master by reason of his breach of contract. Such is certainly not the law. If a servant is prevented from performing his contract by the act or fault of the master, the master cannot, of course, recover or recoup any damages, because the breach is his own. Wood, Master & S. (2d ed.), § 148. But, in case the servant is prevented from fulfilling his contract for personal services by his own sickness, this is not the fault or act of the master, and while the servant will generally be excused from fulfilling his contract and be entitled to recover for the labor performed up to the time of his sickness, the master will be entitled to counterclaim his damages for the breach of contract, for which he (the master) was not responsible. The justice of the rule is apparent on a moment's reflection. Wood, Master & S. (2d ed.), § 122.

Now, it may well be that McKillop would be justified in quitting if the danger of bodily injury was real and imminent, and the threats of the strikers were so serious that a reasonable man in McKillop's situation would have been justified in believing that he was in imminent danger if he continued to work; for it can hardly be claimed that a man must daily carry his life in his hand in such a manner. Still, this condition of things was a condition for which the master was in no way responsible. If it operated to relieve McKillop from his obligation to work the entire season, still it manifestly could not operate to give him any greater right against his employer than as though he had been relieved of

his contract by sickness or *vis major*, for which his employer was not responsible. It is still the employee, and not the employer, who breaks the contract; and the rule that the party who breaks an entire contract shall have no recovery by reason of his part performance of it is relaxed only to the extent of permitting recovery of compensation for the actual benefit conferred upon the employer, or, as more usually expressed, by allowing the employee the value of his services after deducting the damages, if any, suffered by the employer by reason of the breach of the entire contract. Wood, Master & S. § 122; *Fenton v. Clark*, 11 Vt. 557; *Hubbard v. Belden*, 27 Vt. 645; *Patrick v. Putnam*, 27 Vt. 759; *Ryan v. Dayton*, 25 Conn. 188; *Wolfe v. Howes*, 20 N. Y. 197–203; *Clark v. Gilbert*, 26 N. Y. 279; *Allen v. McKibbin*, 5 Mich. 449–455.

In the last-cited case (*Allen v. McKibbin*) the court tersely states the rule as to the measure of recovery thus: "Without reviewing the cases in detail, we think that the only rule which harmonizes them may be laid down substantially as follows: The defaulting plaintiff can in no case recover more than the contract price, and cannot recover that if his work is not reasonably worth it, or if, by paying it, the rest of the work will cost the defendant more than if the whole had been completed under the contract. The party in default can never gain by his default, and the other party can never be permitted to lose by it; and the price thus determined is the true amount recoverable on a *quantum meruit*."

The recovery, then, in the most favorable aspect of the case, is limited to the amount of McKillop's wages at the agreed rate, less any damages resulting to the employer from the termination of the contract. Those damages are stipulated and fixed. The language used in the written agreement is apt, and clearly expresses the understanding that the damages recoverable for a termination thereof shall be fifteen days' wages. The consequences of a ter-

mination of this contract of employment were eminently of the character to justify stipulation of the damages in advance. Uncertainty as to the possibility and expense of finding another employee, and as to the wages to be paid if one be found; uncertainty as to the extent of interruption or embarrassment of the numerous other employees, joined with the uncertain, but possibly very large, liability to vessel owners or shippers which might be imposed upon defendants by interruption of their work, the apportionment of which damages to each, should several of the contracting employees quit at once, would be extremely difficult and intricate,—all these elements bring the situation within the rule adopted in *Berrinkott v. Traphagen*, 39 Wis. 219, 226.

The damages stipulated by the contract equal the amount of the defendant in error's demand, and therefore, upon the most favorable view of the evidence, preclude any recovery. A verdict for the plaintiffs in error should have been directed, and the verdict for the defendant in error should have been set aside.

By the Court.—Judgment reversed, and action remanded for a new trial.

BARDEEN, J., took no part.

WEBSTER and others, Appellants, vs. DOUGLAS COUNTY and others, Respondents.

December 19, 1898—February 21, 1899.

Public officers: Injunction against illegal payments: Compelling repayment: Action by taxpayers: Laches: Innocent purchasers of warrants: Counties: Limitation on highway expenditures: Violation of injunction: Interest: Costs.

1. A taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out the public money for illegal purposes, and may also, under the

proper circumstances, compel public officers and even third persons to repay into the public treasury money already paid out illegally.

2. Under sec. 1308, R. S. 1878, providing that any county board may annually levy "a county road tax not exceeding $8,000, which shall be expended under their direction in making culverts, grading, graveling, ditching, or otherwise improving" highways which have been adopted as county roads or designated for the purpose of spending money in their repair, the amount which a county may spend upon highways in any one year is limited to the amount previously raised by tax. Whatever was said to the contrary in *Harrison v. Milwaukee Co.* 51 Wis. 645, is overruled.

3. Although a taxpayers' suit to enjoin an illegal expenditure of money upon highways pursuant to an unauthorized resolution of the county board was not commenced until after a part of the work had been done and some payments had been made thereon, it is *held* that this was not such laches as would bar the action in respect to future work.

4. An injunctional order forbidding county officers to expend any money or do any work on highways pursuant to an unauthorized resolution of the county board, or until after a road tax should thereafter be levied, was modified so as to allow necessary repairs to be made upon county roads or roads which had been designated for the expenditure of county money. *Held*, that this merely permitted such repairs as were necessary to make travel safe, and did not allow general road work, as contemplated by the resolution, to be carried on.

5. The deliberate disobedience of the injunctional order by the county officers in proceeding with general road work and paying for the same could not be in good faith, nor could there be any ratification of their act by the county board, or any estoppel, which would nullify the command of the court.

6. The county officials who assisted in such violation of the injunction, either by voting the issuance of orders or by countersigning the same or by paying out the money thereon, as well as the persons who received the money, to the extent of the amounts respectively received by them, should be required, in a taxpayers' action, to repay to the county treasury the sums so wrongfully paid out.

7. Moneys paid out by public officers in direct violation of law may be recovered from the officials themselves and from the recipients thereof, in actions seasonably brought by taxpayers on behalf of the public, especially where the transaction is marked by haste, fraud, collusion, or concealment.

8. But a court of equity will not, in such an action, require repayment from one who, for a valuable consideration and in good faith, had purchased county warrants issued in payment for work done under illegal contracts, where, notwithstanding the public nature of the proceedings and of the work, the action was not brought until after a large part of the work had been done and the warrants in question had been issued and paid.
9. Where, at the suit of taxpayers, public officers and contractors are held liable to repay moneys illegally obtained from the public treasury, they should be charged, also, with interest from the time such moneys were unlawfully drawn out.
10. In an action by taxpayers to restrain public officers from paying out public moneys illegally and to compel repayment of moneys already so paid out, it is *held* that costs should be allowed upon final judgment against the defendants.

APPEAL from a judgment of the circuit court for Douglas county: W. F. BAILEY, Judge. *Affirmed as to the defendant Duluth Trust Company; reversed as to the other defendants.*

This is an action in equity commenced August 7, 1894, by the plaintiffs, as taxpayers of *Douglas* county, on behalf of themselves and all others similarly situated, against the county, its supervisors, treasurer, and clerk, together with certain contractors for highway work, to enjoin the alleged illegal expenditure of $8,000, which was then about to be expended in repairing highways throughout the county. A preliminary injunctional order was obtained at the time of the commencement of the action, and served with the summons and complaint; but on the 4th of August twelve warrants had been issued, signed by the chairman of the board of supervisors and the county clerk, to various parties who had done work upon the highways, aggregating $2,984.75, and on the 6th of August nine of these orders were paid by the county treasurer aggregating $2,342.95. Thereupon an amended complaint was served early in September, alleging the issuance and payment of these last-named orders, and claiming that such payment was collusive and with intent to defeat the action, and claiming to recover all money so

paid of the defendants who had received it as well as to enjoin any further payments. On the 28th of December following, a second amended and supplemental complaint was served, and additional defendants were brought in by leave of court. By this complaint it was charged that the county board had paid out $4,402.63 upon illegal highway work in addition to the $2,342.95 previously paid out, and it was sought to recover this sum of the officials who had paid it out, as well as of the parties who had received it, and to enjoin any further payments. The pleadings are long, and it is not deemed necessary to state them any more fully. The facts were mostly admitted upon the trial, and were, in substance, as follows:

In the county of *Douglas*, outside of the city of Superior, there are four towns, to wit, Superior, Gordon, Brule, and Nebagamain, and there were, at the time of the commencement of the action, thirteen members of the board of supervisors, all of whom were made defendants in this action. At the November meeting, 1893, the board of supervisors levied a county road tax of $8,000, under the provisions of sec. 1308, R. S. 1878. Prior to the 5th of June, 1894, all of this $8,000 had been spent upon the highways in the county. On the 5th of June the following resolution was passed by the board of supervisors: "Whereas, the road and bridge committee of *Douglas* county find that the roads and bridges throughout the county are in need of repairs: Therefore, be it resolved that the county board be requested to levy a tax of eight thousand dollars ($8,000.00) at the annual meeting in November next, for road and bridge purposes, said levy to be equally divided between the towns of Brule, Gordon, Superior, and Nebagamain; and that the chairmen of the various towns are authorized and instructed to expend two thousand dollars ($2,000.00) in their various towns under and by direction and recommendation of the road and bridge committee of said county of *Douglas*."

Work immediately commenced under this resolution, consisting of filling, grading, and ditching various roads in the several towns of the county, but no road commissioners were appointed to superintend the work, nor any bonds required from contractors, as required by sec. 1309, R. S. 1878. On the 3d of August, 1894, the county board of supervisors adopted the following resolution: "Whereas, it is evident that the money levied for normal school purposes will not be required until November: Resolved, that eight thousand dollars ($8,000.00) of that amount be transferred to the road and bridge fund, and, when the road and bridge levy is made at the annual meeting, the same shall be credited by the county clerk to the normal school fund, the same to be expended on county roads."

On the same day they allowed the following bills for work which had been done under the resolution of June 5th, viz.: A claim for $1,007.25 in favor of the defendant *McLaggan* for road work in the town of Gordon; also a claim in favor of the defendant *Agen* for $41.80 for road work done in said town of Gordon; also a claim in favor of the defendant *Cassidy* for road work done in the town of Nebagamain for $1,008; also a claim in favor of the defendant *Cloney* for road work done in the town of Nebagamain amounting to $927.70. On the following day twelve county orders were issued for the bills so allowed, and delivered to the defendants in whose favor they were allowed, and on the 6th day of August, being the day before the injunctional order was served, nine of said twelve orders were presented and paid, four of which orders, amounting to $1,008 and covering the claim of *Cassidy*, were paid to the defendant *McClure*, who was a supervisor from the town of Nebagamain, and to whom *Cassidy* had indorsed the orders. The *McLaggan* orders, amounting to $1,007.25, were paid to the defendant the *Duluth Trust Company*, to whom *McLaggan* had indorsed them; and the order for $327.70, being one of the

Cloney orders, was paid to the defendant *O. K. Anderson*, the county clerk, to whom it had been transferred.

On the 7th of August, 1894, the preliminary injunctional order was served with the summons and complaint, which enjoined the board of supervisors from proceeding to expend money or doing work under the resolution of June 5, 1894, and from expending any money or doing any road or bridge work until after a road tax, not exceeding $8,000, should be thereafter levied at the annual meeting, and from expending anything after such levy "except on main traveled highways legally laid out and duly and legally adopted as county roads," and from allowing any bills for road or bridge work until after such levy, and then only for work performed after the levy, and from signing or issuing any county orders for such bills; also enjoining the county treasurer from paying any orders previously issued, including the orders issued on the 4th of August in favor of *McLaggan*, *Agen*, *Cassidy*, and *Cloney*. On the 3d of September following, this temporary injunctional order was modified by the circuit court by striking out the words, "except upon main traveled highways legally laid out and duly and legally adopted as county roads," and inserting in place thereof the following words, viz. "except main traveled highways or parts of said highways duly and legally adopted as such, or such highways or parts thereof duly and legally designated for the expenditure of county money in their repair, pursuant to section 1308 of the Revised Statutes, and except in the exercise of the powers conferred upon counties pursuant to section 1311 of the Revised Statutes," and by adding thereto the following provision: "Ordered, further, that said injunctional order be, and the same is hereby, modified so far as the same enjoins the county board from proceeding in the manner provided by law to make necessary repairs upon roads mentioned in the above exceptions, such repairs to be paid for out of the next levy regularly made for such purposes; but the is-

suing of county orders therefor in advance of such levy, or the taking of funds heretofore raised by taxation for any other special purpose, to pay for any such repairs, are hereby, during the pendency of said action and until the further order of the court, strictly enjoined."

Notwithstanding this order, work proceeded upon the highways of the county under the resolution of June 5th, which work was principally grading and ditching; and at the annual meeting of the board of supervisors in November, 1894, the county board duly levied $8,000 as a county road tax, under sec. 1308, R. S. 1878. At an adjourned meeting of said board of supervisors, held on the 22d of December, 1894, at which seven supervisors only were present, the remaining bills for the work done under the resolution of the 5th of June were allowed, and county orders directed to be issued therefor, and were almost immediately issued, to the various persons who had performed such work, or to whom the claims for such work had been assigned, all of whom are made defendants in this action. The greater part of these orders were paid by the county treasurer on the same day. At that time there was no money in the road and bridge fund of the county, and could not be until the taxes levied at the November meeting were collected. There was much dispute as to whether the highways upon which the work had been done had been adopted as county roads, or whether they had been so designated, under sec. 1308, that the county might properly spend its funds in improving them; but, in the view which is taken of the case, it is not deemed necessary to go into this dispute.

It was undisputed that the contracts for the work which was done under the resolution of June 5th were not made by road commissioners appointed by the board of supervisors, and that no bonds, as required by sec. 1309, were ever given by the contractors for the performance of their duties, but that each chairman made the contracts for the

work done within his town. It was further undisputed that none of such highway work for which the bills aforesaid were allowed was done under the provisions of sec. 1311, R. S. 1878, nor was the same bridge work done under secs. 1319, 1320, R. S. 1878.

The plaintiffs alleged that much of the work was fraudulent in its nature, and that certain of the board of supervisors participated in the fraud and profited in the contracts, and that all of the defendants who received money upon the county orders were participants in the fraud. These allegations of bad faith, however, were negatived by the court, which found that all the contracts were made in good faith, were fully performed, and were allowed in good faith; that there was no conspiracy on the part of the supervisors, or any of them, to defraud the county, and that none of them received any profit from such work, and that the county board believed that they might issue the orders which they drew without violating the injunction, and that they acted upon the advice of counsel in so doing; that the defendant the *Duluth Trust Company* purchased the order held by it for a valuable consideration, and in good faith, with no knowledge of any irregularity therein. The court concluded that the plaintiffs could not maintain this action; that the roads on which the money was expended were duly designated for that purpose; and that the contracts for the road work in controversy were legal contracts, and were executed at the time of the commencement of this action.

In pursuance of these conclusions the complaint was dismissed, and the plaintiffs appeal.

For the appellants there were briefs by *Frederick H. Remington*, attorney, and *Titus & McIntosh*, of counsel, and oral argument by *Mr. Remington* and *Mr. A. C. Titus.*

For the respondents there was a brief by *C. R. Fridley*, *Loud & O'Brien*, and *McCausland & Smith*, and oral argument by *C. R. Fridley*, *P. H. O'Brien*, and *E. F. McCaus-*

land. They argued, among other things, that this was not a case in which one taxpayer could sue in his own behalf and obtain relief, and consequently he could not unite other taxpayers with him. *Doolittle v. Broome Co.* 18 N. Y. 157; *Wood v. Bangs*, 1 Dak. 172; *Newcomb v. Horton*, 18 Wis. 566; *Willard v. Comstock*, 58 Wis. 571. The limitation upon the amount of tax that can be levied is not a limitation upon the amount which may be expended. *Harrison v. Milwaukee Co.* 51 Wis. 661–2; *Howard v. Oshkosh*, 33 Wis. 309; *Kinsey v. Pulaski Co.* 2 Dill. 253; *Emerson v. Blairsville*, 2 Pittsburgh, 39; *People ex rel. Murphy v. Kelly*, 76 N. Y. 475. The acts of the town chairmen were ratified by the county board with full knowledge of the facts. *Trester v. Sheboygan*, 87 Wis. 496; *Hark v. Gladwell*, 49 Wis. 172; *Frederick v. Douglas Co.* 96 Wis. 411. The officers were not guilty of any fraud, and were not liable to refund the money. *Wood v. Bangs*, 1 Dak. 172.

The following opinion was filed January 10, 1899:

WINSLOW, J. It is well settled in this state that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out the public money for illegal purposes, and may also, under the proper circumstances, compel public officers, and even third persons, to repay into the public treasury money already paid out illegally. These propositions do not require further discussion. *Willard v. Comstock*, 58 Wis. 565; *Frederick v. Douglas Co.* 96 Wis. 411; *Quaw v. Paff*, 98 Wis. 586; *Land, L. & L. Co. v. McIntyre*, 100 Wis. 245, 258.

The crucial question in this case is whether the county could legally spend more than $8,000 in one fiscal year upon highways, under the provisions of sec. 1308, R. S. 1878. This section, after providing that county boards may adopt highways or parts of highways as county roads, or may designate highways or parts of highways for the purpose of

spending money in their repair without adopting them as county roads, then provides that any county board "may annually levy, on the taxable property of the county, a county road tax not exceeding eight thousand dollars, *which* shall be expended under their direction, in making culverts, grading, graveling, ditching or otherwise improving such highways."

It seems very manifest to us, from a careful reading of the section, that the amount of the tax fixes the amount which may be expended in any one year. The amount is plainly limited to the amount previously raised by the tax. The board may first raise a sum, and then *spend* it. Whatever is said to the contrary in *Harrison v. Milwaukee Co.* 51 Wis. 645, was not necessary to the decision of that case, and must be considered as overruled. See *Kane v. School Dist.* 52 Wis. 502.

In the present case the board raised $8,000 by tax levied in November, 1893, and spent the entire sum before the 5th of June, 1894. They then proposed to spend $8,000 more, and pay for the work temporarily out of the normal school fund, and finally out of the levy to be made in November, 1894. This they had no power nor right to do. They however proceeded, not in the manner required by sec. 1309, but in a lawless and irregular manner, to parcel out $2,000 to each of the chairmen of the four county towns, and to allow each chairman to spend his portion as he chose. To say that this entire proceeding was irregular and illegal is to speak of it very mildly. The plaintiffs brought their action after the work had begun, and just after about $2,300 of orders had been issued and paid. Laying aside, for the moment, all questions as to the status of the sums which had thus been paid out before the action was begun, we can see no reason why the plaintiffs did not present a case which would require all further work and payments to be stopped. Certainly, it cannot be said that there was laches so far as

future work was concerned, and, as we have already indicated, the expenditure was clearly illegal.

The temporary injunctional order, in no uncertain terms, prevented the board from carrying out the work which had been illegally commenced under the resolution of June 5th. It forbade absolutely the allowance of any bills, or the payment of any orders, for any such work done thereafter and prior to the next tax levy. The only substantial change in this prohibition, which was made by the modifying order of September 3d, so far as the present question is concerned, was to allow necessary repairs to be made upon county roads or roads which had been designated for the expenditure of county money. The purpose and meaning of this modification was to allow the board to make emergency repairs, or such repairs on roads as were *necessary* to make travel *safe*, so that the duty of the county to travelers upon its highways might still be discharged. It is idle to say or to argue that the meaning of the modification was to allow general road work, as contemplated by the resolution of June 5th, to be carried on under new contracts. If such was its meaning, then it was not a modification, but an abrogation, of the injunctional order, and the proper course would have been to vacate the original order. New contractors were found who were willing to go on with the work and take their chances. A majority of the county board, after the tax levy of November, 1894, pretended to accept the work, and a considerable part of it was paid for. It is said, and gravely found by the circuit court, that this was all done in good faith! There is as little room for good faith in the deliberate disobedience of an injunctional order as there is in the deliberate commission of a crime. Nor is there room for ratification or estoppel. The plain fact is that the acts of the public officials and contractors, after the injunctional order of August 7th was issued and served upon them, in proceeding with general road work, and in

issuing orders to pay for the work, and in actually paying for a good part of it, were and are utterly indefensible. They were deliberate contempts of court. They could not be in good faith, under such circumstances, nor can acts of ratification or estoppel nullify the command of the court. By the temporary injunction the parties to the action were commanded to refrain from further action until the controversy was heard upon its merits and decided, so that the final judgment might be effective. This order has been disobeyed, and large sums have been paid out by the county officers in defiance of the order. Now, at the close of the litigation, it is found that the preliminary injunction should be made permanent; but the *status quo* has been changed by disobedience of the preliminary order, and this disobedience is alleged to have been a disobedience in good faith, and a disobedience which the county board has ratified and condoned. These claims are manifestly absurd.

The work, under the resolution of June 5, 1894, was illegal from start to finish. After the injunctional order of August 7th, it should have stopped at once in obedience to the order of the court; but the order having been disobeyed and a large part of the money having been paid out, the officials who assisted in the violation of the injunction, either by voting the issuance of orders or by countersigning the same, or by paying out the money thereon, as well as the defendants who received such moneys, to the extent of the amounts respectively received by them, must be required by the judgment to repay to the county treasury the sums so wrongfully paid out.

The question of the recovery of the sums paid out on the 6th of August, just prior to the commencement of this action, is now to be considered. The total amount then paid out was $2,342.95, of which $1,008 was paid to the defendant *McClure*, chairman of the town of Nebagamain, and also chairman of the county board, upon four orders issued

to the contractor *Cassidy*; and indorsed by him to *McClure* for the convenience of *Cassidy;* $1,007.25 was paid to the defendant the *Duluth Trust Company* upon four orders issued to the contractor *McLaggan*, and purchased by the company of *McLaggan;* and $327.70 was paid to the defendant *O. K. Anderson*, then county clerk of *Douglas* county, upon an order issued to the contractor *Cloney* and by him transferred to *Anderson*. As to the moneys paid to *McClure* and *Anderson*, as assignees of the *Cassidy* and *Cloney* orders, the situation is not doubtful. Both of these defendants were public officials, charged with important duties in relation to the expenditure of the public moneys. They were trustees of the public funds. Among other duties, both of these officers were required to countersign all county orders. R. S. 1878, secs. 667, 709, subd. 3. It was their sworn duty to issue no orders for highway work, under sec. 1309, until a committee of three had viewed the work and reported that the same was done in accordance with the contract. This duty they violated flagrantly. Not only was there no such inspection of the work, but the bills were railroaded through the board on the day of their presentation or on the following day, when there were no moneys in the fund to pay them, evidently with a settled design to give no opportunity for inspection. The warrants were immediately indorsed by the contractors to the defendants *McClure* and *Anderson*, respectively, and the money drawn out of the treasury. It is true the court has found that the defendants in question had no pecuniary interest in the transaction, and that they acted in good faith, but even these findings cannot relieve them from liability for their breach of trust in drawing out of the treasury money for a purpose not authorized by law. Such money they must return, even if they had no wicked intent; but we do not think the circumstances in proof admit of a finding of good faith. The allowance of these accounts and payment of these mon-

eys were marked by haste and apparent collusion with the contractors which requires an explanation more convincing than any which appears in the evidence in this case. The presumption of fraud which necessarily arises from the allowance of illegal bills so hastily, when there were no funds in the treasury to pay them with, the money being drawn out by the auditing officers themselves, has not been met and rebutted. Under the authorities cited in this opinion in our own state, as well as the authorities cited in *Frederick v. Douglas Co.*, *supra*, we hold that the defendants *McClure* and *Anderson* must be held liable to return the county funds so received by them. The general principles of law laid down in the cases of *Frederick v. Douglas Co.* 96 Wis. 411, and *Land, L. & L. Co. v. McIntyre*, 100 Wis. 245, 258, are applicable to this case. Moneys paid out by public officers in direct violation of law may be recovered from the officials themselves, and from the recipients thereof, in actions which are seasonably brought by taxpayers on behalf of the public, especially where the transaction is marked by haste, fraud, collusion, or concealment. The evidences of haste, collusion, and concealment in this case are too plain to be overlooked or misunderstood, and it is evident that the contractors *McLaggan*, *Cassidy*, *Cloney*, and *Agen* actively assisted the disbursing officers in their efforts to deplete the treasury before interference by action was possible, and hence they must also be held liable to the extent of the moneys received by them, respectively.

As to the moneys paid to the *Duluth Trust Company*, the court found that the orders held by the company were purchased for a valuable consideration, and in good faith, and with no knowledge of any conspiracy or irregularity in the expenditure of the money. These findings are sufficiently supported by the evidence, and we think they must be held to free the defendant trust company from liability in this form of action, at least. It is true that the orders possess none of the qualities of negotiable paper, and that the holder

stands in the shoes of the payee. 1 Dillon, Mun. Corp. § 503. Had payment been refused by the county treasurer, and action been brought against the county upon them, all the defenses which could have been urged against the original holder could have been urged against the transferee. But the question here is quite different. The resolution under which the work in question was done was adopted June 5, 1894, and work was at once commenced under it, so that nearly $3,000 worth of highway work had been done on the 3d of August before this suit was commenced. The resolution was public in its nature, the work was also public, and we feel that the neglect in bringing the action until after so much work had been done, and orders issued and negotiated in the hands of innocent third persons, must operate to prevent recovery against such third persons, upon the principle of laches, as laid down in the case of *Frederick v. Douglas Co.* 96 Wis. 411. The plaintiffs have invoked the relief of a court of equity, and they have delayed in so doing until serious injury will result to a party who had no participation in the illegal contract, if the plaintiffs be allowed to recover. We are not now discussing the rights or remedies of the county itself, in a proper action brought by its officers to recover funds illegally obtained from the treasury, but simply what a court of equity will do when its aid is invoked by a taxpayer who might have brought his suit earlier and prevented the mischief, had he chosen to do so.

The defendant trust company cannot be held liable in this action. The supervisors who authorized the illegal contracts and expenditures must, however, be held liable, and the auditing and disbursing officers, as well as the contractors and their assignees, to the extent of the amounts received by them, respectively, after the commencement of this action.

By the Court.—As to the defendant *Duluth Trust Company*, the judgment is affirmed, without costs, except attor-

ney's fees; and, as to the remaining defendants, the judgment is reversed, with costs, and with directions to enter judgment for the plaintiff in accordance with this opinion.

The following opinion was filed February 21, 1899:

WINSLOW, J. A motion is made to correct the mandate in this case so that it shall direct the allowance of interest upon the sums drawn out of the county treasury. It is apparent that interest ought to be allowed from the time the moneys were unlawfully drawn out, and the opinion and mandate will be amended so as to direct that such interest be allowed. The motion also asks that the trial court be directed to allow costs against the defendants upon final judgment. Certainly there can be no question but that the defendants should be adjudged to pay the costs of the action, and the circuit court should be directed to enter such judgment.

By the Court.—It is so ordered.

BARDEEN, J., took no part.

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CROUSE, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

January 10—February 21, 1899.

Railroads: Injury to engineer by washout: Contributory negligence: Special verdict: Proximate cause: Evidence: Burden of proof: Medical experts: Annuity tables: Damages: Husband and wife: Costs: Printing.

1. In an action by a locomotive engineer against a railroad company for personal injuries sustained in consequence of a washout at a culvert, it appeared that he was not proceeding with the caution

required by the rules of the company in case of sudden and heavy rains or indications of high water, but it did not appear conclusively that he knew that the rains in that vicinity had been so severe or unusual as to call for the exercise of such caution. *Held*, that he was not guilty of contributory negligence as a matter of law.

2. A verdict in such action that the track was negligently constructed and unsafe, so that an ordinary rain storm would wash it out: that it was not properly inspected on the night in question; and that the injury was the result of the washout, without contributory negligence on the part of the plaintiff, is a sufficient finding as to proximate cause.

3. Upon the question, submitted for special verdict, whether the culvert was negligently constructed and maintained by the defendant so as to render it inadequate for the purpose for which it was constructed, the burden of proof was upon the plaintiff. Sec. 1816, Stats. 1898 (providing for a recovery where a railroad employee is injured by a defect in any track, when such defect could have been discovered by reasonable and proper care, and that proof of such defect shall be presumptive evidence of knowledge thereof on the part of the company), did not relieve him from such burden, since the question related to original defects in the culvert before the washout, and until such defects were shown to exist the presumption of knowledge thereof did not arise.

4. Upon the questions whether the washout could have been discovered by defendant's employees by the exercise of reasonable care in time to prevent the accident, and whether the track walker was negligent in not properly inspecting the track, the burden of proof was also upon the plaintiff, when it appeared that the washout had occurred within a few hours of the accident and that the company in fact had no notice of it.

5. A refusal to submit questions for a special verdict as requested is not error where those submitted cover all the material issues.

6. An hypothetical question to an expert witness, which, after stating in detail the particulars of the plaintiff's injury, his symptoms, treatment, and subsequent physical condition, asks the witness what in his judgment was the cause of the plaintiff's condition, *held* proper.

7. In an action by a married man for personal injuries, he is entitled to recover the value of his wife's services in nursing him, rendered necessary by the injuries.

8. In an action for personal injuries producing permanent disability, the annuity tables found in the Revised Statutes are admissible upon the question of damages, but they are to be considered in con-

nection with all other evidence on that issue, and not to be treated as the mathematical basis for determining such damages.

9. The fact that the plaintiff is a married man cannot be considered in determining the damages for a personal injury.

10. A railway company is not charged with an absolute duty to its employees to make its culverts safe, but only with reasonable and ordinary care and prudence to make them safe, considering their uses and purposes.

11. The printed case herein, containing the bill of exceptions in full, and the appellant's brief, which fails to make the proper references to the record, are *held* not to comply with Supreme Court Rules VIII, IX; and an allowance for the printing thereof was properly refused in the taxation of costs.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

This is an action for personal injuries. On and prior to July 26, 1896, the plaintiff was a locomotive engineer in the employ of the defendant, running between Oshkosh and Janesville. On the night of July 26th, at about 11:50 o'clock, the plaintiff was running the engine attached to a freight train southward over the defendant's railroad, and ran into a washout about a mile and a half north of the city of Janesville, and was seriously injured. The washout had occurred during a heavy rainstorm on the evening in question, and it was located at a place where there had been for many years a small, wooden culvert. The complaint charges the defendant with negligence in originally building the culvert too small, and by allowing it to become out of repair and unsafe, and by digging away the supporting earth and gravel on one side of the culvert, thus rendering the roadbed weak, and by failure to patrol the track and warn the plaintiff of the washout. The evidence showed that the plaintiff left Oshkosh, with his freight train, at a little after 4 o'clock in the afternoon, and that about 8 o'clock in the evening, when between Juneau and Clyman, it rained; that at Koshkonong he was flagged, and stopped his train, and the section foreman of that section told him that his

section was all right, and to go ahead. The rain continued, and near Milton Junction he could see that it had been raining hard. He stopped at Milton Junction long enough to get a clearance slip for Janesville, which is eight miles distant, and left Milton Junction at about 11:15 p. m. It was dark and rainy, with occasional flashes of lightning. He testifies that his train, at the time of the accident, was going ten or twelve miles an hour, and there is testimony on the part of some of the other train employees that it was going from fifteen to eighteen miles an hour. After going under the bridge called Black bridge, by a flash of lightning he suddenly saw in the track a black place fifty or sixty feet in front of him, looking like a bridge. He knew there was no bridge there, and that it must be a washout. He had twenty-six cars in his train, and testifies that it was impossible to stop before reaching the washout, so he opened the throttle and made a run for it. The engine went over the washout, being pressed forward by the weight and momentum of the train behind, and stopped suddenly off the rails. The plaintiff was thrown against the fire box, and seriously injured.

A special verdict was demanded and rendered as follows, and, in connection therewith, a general verdict was rendered for the plaintiff: "(1) Was the culvert in question so constructed and maintained as to conduct through it the water which it was intended to conduct through, not only in ordinary showers, but in severe showers that would naturally occur during a series of years, and which could reasonably be anticipated? *A.* It was not. (2) Was the culvert in question negligently and carelessly constructed and maintained by the defendant company, or its agents or employees, so as to render it inadequate for the purpose for which it was constructed? *A.* It was. (3) Was the said culvert carefully and thoroughly inspected from time to time by the employees of the company whose duty it was to give such inspection? *A.* It was not. (4) Did the nearness of the gravel pit to the cul-

vert, in the month of July, 1896, render said culvert unsafe, in view of the water that might be conducted through it? *A.* Yes, it did. (5) Was the rainstorm on the night of July 26, 1896, extraordinary, unusual, and unexpected in its character, or unprecedented, and one which had only occurred at such long and irregular intervals that it would not be anticipated by men of ordinary prudence in their business calculations? *A.* It was not. (6) Might the washout in the track have been discovered by the defendant railway company by reasonable and proper inspection and in time to have prevented the accident? *A.* Yes, it might. (7) Was the storm which occurred on the night of July 26, 1896, one likely to cause damage to the defendant's roadbed and track, where the culvert in question was situated? *A.* It was. (8) Was the defendant's servant Stageman guilty of any negligence in not properly and carefully inspecting the road near where the culvert was, on the night in question? *A.* He was. (9) Was the plaintiff in the exercise of ordinary care at and prior to the time of his injury? *A.* He was. (10) Was the plaintiff injured, on the night in question, in consequence of the washout without contributory negligence on his part? *A.* He was. (11) What damages has the plaintiff sustained in consequence of the injury received on the night in question? *A.* $20,000."

Judgment was entered on the verdict for the plaintiff, and the defendant appeals.

For the appellant there was a brief by *Fish, Cary, Upham & Black*, attorneys, and *C. H. Van Alstine*, of counsel, and oral argument by *Mr. Van Alstine* and *Mr. John T. Fish.* They argued, *inter alia*, that the plaintiff was guilty of contributory negligence, as matter of law, by his failure to use the highest degree of care called for by the rules of the company, in view of the severity of the storm which caused the washout. *Nolen v. N. Y. & N. H. R. Co.* 25 Am. & Eng. R. Cas. 342, 345; *Pennsylvania Co. v. Whitcomb*, 111

Ind. 212, 219; Elliott, R. R. §§ 1280–1283. There was no sufficient finding of proximate cause to support the judgment. *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348; *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279; *McGowan v. C. & N. W. R. Co.* 91 Wis. 147, 154, 155; *Maitland v. Gilbert P. Co.* 97 Wis. 476; *Davis v. C., M. & St. P. R. Co.* 93 Wis. 470, 482. The plaintiff was not entitled to recover the value of his wife's services in nursing him, it being a duty she owed to him. *Peterson v. Oleson*, 47 Wis. 131; *Goodhart v. Pennsylvania R. Co.* 5 Am. & Eng. R. Cas. N. S. 364, 366; *Drinkwater v. Dinsmore*, 80 N. Y. 390, 393; *Chicago, B. & Q. R. Co. v. Johnson*, 24 Ill. App. 468, 470; 2 Thompson, Negligence, 1258, § 44; *Reed v. C., R. I. & P. R. Co.* 8 Am. & Eng. R. Cas. 180; *Owen v. Peoples P. R. Co.* 155 Pa. St. 334; *Wallace v. W. N. C. R. Co.* 41 Am. & Eng. R. Cas. 212, 215; *Chicago & E. I. R. Co. v. Holland*, 30 Am. & Eng. R. Cas. 590; *Coleman v. Burr*, 93 N. Y. 17, 25.

For the respondent there was a brief by *Fethers, Jeffris & Mouat*, and oral argument by *O. H. Fethers* and *M. G. Jeffris*. They argued, among other things, that the plaintiff was entitled to recover for the services of his wife as nurse. *The D. S. Gregory*, 2 Ben. 286; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Brosnan v. Sweetser*, 127 Ind. 1; *Indianapolis v. Gaston*, 58 Ind. 227; *Denver & R. G. R. Co. v. Lorentzen*, 49 U. S. App. 81; *Forbes v. Loftin*, 50 Ala. 396; *Klein v. Thompson*, 19 Ohio St. 569; *Missouri, K. & T. R. Co. v. Holman*, 39 S. W. Rep. 130; *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317; *Cunningham v. E. & T. H. R. Co.* 102 Ind. 478, 484; *Murray v. M. P. R. Co.* 101 Mo. 236; *Varnham v. Council Bluffs*, 52 Iowa, 698; *Fort Worth & D. C. R. Co. v. Kennedy*, 12 Tex. Civ. App. 654; *Summers v. Tarney*, 123 Ind. 560. It was the duty of the railroad company to use all reasonable and proper care to build and maintain a culvert large enough to safely carry the water through it. *Jarnek v. Manitowoc C. & D. Co.* 97 Wis. 537.

WINSLOW, J. 1. It was very strenuously insisted by the defendant's counsel on the argument of the case that the evidence showed that the plaintiff was guilty of contributory negligence as a matter of law. In this connection the following rules of the railroad company, with which the plaintiff was familiar, were put in evidence: "RULE 128. Freight and special trains must not pass over any switch at a speed exceeding ten miles an hour." "RULE 410. The protection of the trains of the company from accident during storms, and from danger of the track and bridges being washed out by sudden and heavy rains and rise in streams, *especially if they occur in the night*, is of the greatest importance, and all employees in the operating department are directed to familiarize themselves with the following instructions, and carry them out strictly." "RULE 414. Conductors and engineers on the road, when overtaken between stations by such storms or indications of high water which will cause damage, will proceed with great caution, keeping their trains under complete control, and at such speed that they can be stopped, after coming in sight of any obstruction or damage to track, in time to prevent accident. They will stop to examine bridges and culverts or other places liable to be damaged by high water, and, if they find any indication of danger from proceeding with their trains, will, on the arrival at the first telegraph station, call up the agent or operator, and report to the office of their respective division superintendents for instructions, and will not proceed until such instructions are received."

The evidence showed that the plaintiff was an experienced engineer, forty-two years of age, and had run trains over this section of road for upwards of sixteen years. It is claimed that the plaintiff, by his own statement, shows that he was operating his train at a negligently high rate of speed as he approached this culvert, and that he violated rules 128 and 414, above quoted, and that by reason of such violation of rules the accident happened. We are not able to agree

with the contention that contributory negligence was proven as matter of law. While it appears that there were very heavy rainstorms at or near Janesville during the afternoon and evening in question, it does not appear conclusively that the plaintiff knew that these storms were so severe or unusual in their nature as to call for the exercise of the precautions demanded by rule 414, above quoted. The plaintiff testified that an ordinary rain commenced to fall when his train was two miles south of Juneau, and that it rained while they were running about seven miles, and then stopped; that at Milton Junction he could see that it had been raining a little harder, and there was water standing in the fields; that it was then raining, but not heavily, and continued to rain until they reached the washout. There is nothing inherently improbable in his testimony, nor is the testimony of opposing witnesses so conclusive on the subject as to render the plaintiff's testimony incredible. It does not appear by undisputed testimony that the train "was overtaken between stations by such storms or indications of high water" as would require him to proceed with great caution under rule 414. There was testimony from which this fact might be well found, but it is not conclusively proven. Nor does it appear that there was any switch at, or in the immediate vicinity of, the washout, by reason of which the speed should have been reduced to ten miles an hour under rule 128.

2. It is argued that proximate cause is not found by the verdict, and hence that the judgment cannot be sustained. When a train plunges through an unsafe bridge, there is little room to speculate on proximate cause. If the bridge was constructed for the passage of heavy trains over it, and was negligently and unsafely constructed, the destruction of a train and the loss of human life thereon must necessarily be contemplated by any reasonable man who built it. He cannot say that he did not anticipate an accident. Such a

claim would be puerile. As well might a municipal corporation which has left an open pit in a street defend on the ground that it could not anticipate that a traveler would fall into it. The question as to proximate cause was sufficiently answered when it was found that the viaduct was negligently constructed and unsafe, so that an ordinary rainstorm would wash it out, and was not properly inspected on the night in question, and that the plaintiff was injured, in consequence of the washout, without contributory negligence on his part.

3. In this connection it is urged that the verdict of the jury to the effect that the rainstorm on the night in question was not an extraordinary and unprecedented storm is contrary to the evidence. Examination of the evidence, however, convinces us that the question was fairly one for the jury.

4. It is also urged that it was error to allow certain medical experts to answer a long hypothetical question, which, after stating in detail the particulars of the plaintiff's injury, related at length the plaintiff's symptoms, treatment, and physical condition from that time to the time of the trial, and upon this statement asked the witness what, in his judgment, was the cause of the plaintiff's condition. To this question the witnesses each replied that the plaintiff's condition was the result of the injuries received by him in the accident. There was no error in the admission of the question. A question precisely similar in form was approved in *Selleck v. Janesville*, 100 Wis. 157.

5. The defendant proposed twenty-three questions for the special verdict, and the court refused to give them, and submitted instead eleven questions. The refusal to give the questions asked is now assigned as error. Many of the questions asked by the defendant are lengthy and involved, and careful examination of the issues convinces us that the material issues of the case were all covered by the special verdict

as submitted; hence it was not error to refuse the defendant's request. What is said upon this general subject in *Ward v. C., M. & St. P. R. Co., post*, p. 215, will be found applicable here.

6. It appeared by the evidence that plaintiff's wife had nursed the plaintiff for a year, and the plaintiff's counsel argued to the jury that the plaintiff was entitled to recover the value of his wife's services in so nursing him, and said, "He is entitled to his wife's services, and no one can take them from him." To this remark the defendant objected on the ground that the plaintiff could not recover for his wife's services, because it was her duty to nurse him. In ruling on the question the court said: "The defendant company is not entitled to the services of a man's wife, and her services belong to her husband, as disclosed by the evidence here. If she has been compelled to nurse him in consequence of the injury, I see no reason why it is not a proper charge." To this remark exception was taken. We think there was no error in this ruling. The authorities are not uniform on the subject, but we think the court's ruling sustained by the better reason. The defendant should not be allowed to profit by reason of the loving care of the wife. *Varnham v. Council Bluffs*, 52 Iowa, 698; *Missouri, K. & T. R. Co. v. Holman* (Tex. Civ. App.), 39 S. W. Rep. 130; *Brosnan v. Sweetser*, 127 Ind. 1.

7. The plaintiff offered in evidence the annuity tables found in the Revised Statutes of Wisconsin (Stats. 1898, p. 2461), and the same were received in evidence under objection and exception. Mr. Fethers, in his argument to the jury, after computing the amount *Crouse* earned in a year and adding to it the annual cost of nursing and physician's services, making the whole amount $1,798, spoke as follows: "We have, then, under the lowest figure given by the testimony, a money loss of $1,798 a year to *George Crouse*,—$1,798 a year cash. Under the annuity tables, taking the

lowest figure,—and you are entitled, under the testimony in this case, to consider if he will not live on beyond it, but taking that low figure according to the annuity tables, his money loss would be $19,247.59. At forty-one — say you start there — he was born on the 8th of January, I think, and he was injured on the 26th of July, so his nearest birthday would be nearer forty-one than to forty, and you get about forty and one-half he was then; but say that his nearest birthday is forty-one — his actual money loss would be $19,039.12. The difference between the two years, whichever is considered, is only $200. In other words, more than $19,000, considered from the standpoint of the expectancy of the annuity tables, in connection with the other testimony, would be his actual money loss should he live to that time." Counsel for defendant objected to the argument, and asked the court to instruct the jury that it was an improper argument to make on the question of damages, and the court replied: "I think that is proper. I overrule the objection." To the ruling of the court the defendant excepted.

Mr. Jeffris, in his argument to the jury, said, in respect to these annuity tables, as follows: "After this accident, *Mr. Crouse* may live ten, twenty, thirty, yes, he may live forty years, but we are not entitled to forty years' pay for his service and forty years' time. But the supreme court has laid down the rule upon which these things are figured on their present purchase value. If a man is paid the cash, it is limited to something like ten years." To the remark of Mr. Jeffris counsel for defendant objected upon the ground that it was an improper argument to make to the jury, and asked the court to instruct the jury that they were not to pay any attention to it. Thereupon the court ruled as follows: "*Court:* Well, I shall not instruct the jury any such thing." The defendant thereupon excepted to the ruling of the court, and the court then said of its own motion: "Yes, I instruct the jury that his remarks in regard

to the annuity tables, I think, are proper." To such remark and ruling of the court the defendant excepted. In view of the fact that the annuity tables were admitted in evidence, counsel for defendant requested the court to charge the jury as follows: "The annuity table received in evidence was received upon the theory that it would afford you some aid in determining the amount of damages. The table is not a rule for you to follow in assessing the damages. The makers of the annuity table did not take into account several things important in this case, namely, that the man injured might die before the end of his expectancy of life of some disease not caused by the injury; that he might not be willing to work to the end of his expectancy of life; that he might, before the end of his expectancy of life, be rendered incapable of work by disease not caused by the injury, and that he might be rendered incapable of work by reason of other accidents and injuries." This instruction was refused, and defendant excepted.

While the authorities are not entirely uniform on the question of the admission of standard tables showing the expectancy of life in injury cases where death has not resulted, it seems that the weight of authority is in favor of their admissibility. See note to *Union P. R. Co. v. Yates*, 40 L. R. A. 553, where the authorities are collated. This court held the annuity tables admissible in *McKeigue v. Janesville*, 68 Wis. 50 (which was a death case), "not as forming a legal basis upon which the jury might determine the probable length of the life of the deceased, but as evidence which the jury might consider with all the other evidence in the case upon that point." We see no very good reason why such tables should be admissible in a death case upon the question of probable length of life, and not in a case of personal injury, where damages for permanent injuries are sought. In both cases the question of probable length of life is an important one, which the jury must consider if

they find for the plaintiff. It is true, the annuity tables are more favorable to the defendant than the tables of expectancy of life, but of this the defendant cannot complain. But it must be very certain that such tables do not form a mathematical basis for the estimation of damages as they were used with the direct sanction of the court in this case. You cannot take the amount a man was earning when injured, and multiply it by the figures in an annuity table, and thus reduce his damages to exact figures by the rules of arithmetic. This was done in this case, and the court said it was proper, and the verdict of the jury is so near the amount so figured out as to give ground for believing that the jury considered it as a rule to follow. Of course, there is no such rule. There are many other elements in the problem which must be considered. The plaintiff's ability to labor would almost certainly decrease with years, or by natural disease, or he might not desire to continue in his arduous employment. So we think the court erred in approving the mathematical rule laid down by the plaintiff's counsel, as well as in refusing the instruction offered by the defendant upon the subject. *Hunn v. M. C. R. Co.* 78 Mich. 513; *Harrison v. Sutter St. R. Co.* 116 Cal. 156; *Goodhart v. Pa. R. Co.* 177 Pa. St. 1, 5 Am. & Eng. R. Cas. N. S. 364.

8. In connection with each of the second, third, sixth, and eighth questions of the special verdict the defendant requested an instruction, in substance, that the burden of proof in each case rested upon the plaintiff, and that they must be satisfied to a reasonable certainty by the preponderance of the evidence, in order to answer the question in the affirmative. These instructions were all refused, nor was the substance of them given. Certainly it was applicable to the second question,— as to whether the culvert was negligently constructed and maintained,— and should have been given. But it is claimed that the rule as to burden of proof as to all these questions has been changed by the terms of sec. 1,

ch. 220, Laws of 1893 (now subd. 1, sec. 1816, Stats. 1898). This statute provides for a recovery where a railroad employee, without contributory negligence, is injured by a defect in any locomotive engine, car, rail, *track*, machinery, or appliance required by said company to be used in and about the business of such employment, when such defect could have been discovered by reasonable and proper care, tests, and inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of the company.

While we think the word *track*, in this law, clearly includes the roadbed upon which the track rests, we do not see how the law affects the question of burden of proof as to the second question. That question inquires whether there were original defects in the culvert before the washout. Until the plaintiff has shown that there were such defects, the law does not begin to apply. He must first show the defects, and must necessarily show them by preponderance of the evidence, and then the presumption of knowledge of the defect steps in. As to questions 6 and 8, the argument is somewhat different, but still we think the instruction should have been given. By answers to these questions the jury were to say whether the washout could have been discovered by defendant's employees by the exercise of reasonable care in time to prevent the accident, and whether the track walker was negligent in not properly inspecting the track. As to the sixth question, doubtless the law raised a presumption, on a showing that the washout existed, that the company had knowledge of it; but this was a mere disputable presumption of fact, and when it appeared that the washout had occurred within a few hours, and that the company in fact had no notice, the question whether the washout had existed so long under the circumstances that the company, by proper inspection, should have learned the fact, or was negligent in not knowing it, was still a question for the jury, and one upon which the burden

of proof was still upon the plaintiff. The law raised a presumption of knowledge of the washout, but not a presumption of negligence from want of knowledge. These remarks apply to the eighth question with equal force.

9. Upon the question of damages the court was requested to charge that the fact that the plaintiff was married was not to be considered in arriving at the amount of the damages, but refused. This charge should have been given.

10. One sentence of the charge seems to convey the idea that it was an absolute duty resting on the railway company to make the culvert safe, thus making the company an insurer. It seems probable from the context that this was not the intentional, but simply an inadvertent, use of language, but we call attention to it because there must be a new trial. Reasonable and ordinary care and prudence to make it safe, considering its uses and purposes, is the duty imposed on the company, and which it cannot delegate. It does not insure safety.

A general verdict was rendered under a long general charge in connection with the special verdict. While no specific objection appears in this case to the submission of such general verdict, attention is called to the discussion of the propriety of this course in the case of *Ward v. C., M. & St. P. R. Co.*, *post*, p. 215. What is there said is precisely applicable to the present case.

We have found no other questions which seem necessary to be discussed.

By the Court.— Judgment reversed, and action remanded for a new trial.

BARDEEN, J., took no part.

The appellant moved to set aside the clerk's taxation of costs.

John T. Fish, for the motion.

O. H. Fethers, *contra.*

The following opinion was filed April 4, 1899:

BARDEEN, J. This is a motion to review the clerk's taxation of costs. The appellant prevailed on the appeal. The respondent objected to two items in appellant's cost bill, as follows:

Paid for printing case	$282 00
Paid for printing brief	72 00

The clerk disallowed both items, on the ground that appellant had not complied with Rules VIII and IX of this court. The objection to the first item was that the printed case violated Rule VIII, in that it contained the bill of exceptions in full, and not "so much of the record . . . as may be necessary to a full understanding of the questions presented for decision," and for the further reason that the pages of the record were not referred to by numerals on the left-hand margin of the page, under the words "Page of Record." The second item was objected to on the ground that the appellant's brief did not comply with that part of Rule IX which says, "Each statement and proposition therein which is based upon the record must refer to the page of the record as contained in the printed case upon which the same is based." Appellant admits that both case and brief are susceptible to these objections, but it is said that, inasmuch as the entire bill of exceptions has been printed, the penalty of disallowing costs upon failure to comply with these provisions ought not to be inflicted. The fact that it is noted in the case, at the beginning of the alleged "Abstract of the Bill of Exceptions," under the words "Page of Record," that what follows may be found on pages 41 to 365 of the record, does not relieve from this infirmity. The purpose of the rule is to enable the court to refer to the record with certainty and dispatch. With the case as printed, it is impossible to do so. We have tested it in that regard, and the result is vexatious. Testimony in the printed case

cannot be found in the record, except after considerable search and delay. The business of the court is so urgent and pressing as to require all possible aids in the consideration of cases. So imperative are such demands, that a strict adherence to the rules is of the utmost importance. We cannot relax from their rigor without destroying their purpose. It is the certainty of their enforcement that makes attorneys careful. In this case counsel made very little effort to abstract the record. Page after page is taken up with figures as to the height of water above the dam at Janesville. Several exhibits are printed at length that could have been abstracted or condensed into one twentieth of the space actually covered. Testimony of several witnesses is printed in full, the greater part of which could have been omitted as having no bearing on the real points involved. It frequently happens in the trial of cases at the circuit that a vast amount of rubbish and immaterial matter gets in, that has no bearing upon the questions involved on an appeal. Hence, as the rule says, the printed case should contain an abstract or abridgment of so much of the record as may be necessary to a full understanding of the questions presented for decision, and no more. A more lively appreciation of this rule would reduce the volume of printed matter submitted for our consideration, and somewhat lighten our labors.

The objections to the brief really rest upon the infirmities in the printed case. Neither case nor brief having been prepared in conformity to the rules named, the clerk very properly disallowed the items sought to be taxed therefor.

By the Court.—The motion to retax the costs is denied, with $10 costs, and the taxation by the clerk is affirmed.

HARDEN, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

January 10—February 21, 1899.

Railroads: Injury to passenger on freight train: Negligence: Contributory negligence: Court and jury.

1. The plaintiff, a passenger on a freight train, while standing in the caboose, was thrown against the door by a sudden shock of the cars coming together in making a coupling, and was injured. There was evidence tending to show that the parts of the train were brought together with unusual violence, such as could be accounted for only by negligence in the train hands or defective apparatus. *Held* that, although defendant's witnesses fully contradicted any unusual violence, the question of defendant's negligence was one for the jury.
2. The question of plaintiff's contributory negligence should also have been submitted to the jury, in view of the evidence in respect to his position and his knowledge that a coupling was soon to be made.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

Plaintiff lawfully took passage on a freight train accustomed to carry passengers, which, stopping at Elkhorn to do switching, left the caboose, with three or four cars attached, standing on the track. Plaintiff, after half an hour's wait, left his seat in the caboose, and went out on the front platform, looked at the other part of the train, consisting of the engine and seven or eight cars, moving about, realized that they were likely before long to back down and couple onto the rear portion of the train, but saw nothing indicating how soon. He returned into the car, stepped into the closet, and on coming out stopped in the aisle, with his back toward the front door, hands in pockets, and spoke with another passenger for a moment. While so standing, the engine and front part of the train backed down to make coupling, and struck the rear part of the

train with unusual severity, according to the testimony of plaintiff and one other witness, but, according to the testimony of others, with no more than usual. Plaintiff was accustomed to ride on freight trains, and had the knowledge common to that experience of the probability of a jar or shock in making couplings. The shock threw him over backward so that he struck the front door and received injuries to his back. At the close of the testimony on both sides the circuit court granted a nonsuit for want of evidence of negligence on the part of the defendant, also intimating that the plaintiff was shown by uncontradicted evidence to be guilty of contributory negligence. From judgment thereon this appeal is taken.

For the appellant there was a brief by *J. J. Cunningham*, attorney, and *M. G. Jeffris*, of counsel, and oral argument by *Mr. Jeffris*.

For the respondent there was a brief by *Jackson & Jackson*, attorneys, and *H. H. Field*, of counsel, and oral argument by *Mr. Field*.

DODGE, J. 1. We find it impossible to agree with the court below in the conclusion that there was no evidence to go to the jury on the question of defendant's negligence. The testimony both of the plaintiff and of the witness Slocum tended to show that the forward portion of the train was driven against the rear part with such violence as could be accounted for only by negligence in the train hands, or defective apparatus. The testimony of both witnesses is that the shock of the collision was more violent than any either had known in the coupling of freight trains, of which both had had much prior experience. Slocum placed the rate of speed of the backing train at four or five miles per hour, of which, however, he obviously could judge only by the violence of the collision. Plaintiff testified that the caboose was driven backward some thirty feet. True, defendant's witnesses very

fully contradict any unusual violence; but for the purpose of nonsuit the evidence for defendant, at least such as merely raises a conflict with that for the plaintiff, is not to be considered. *Lewis v. Prien*, 98 Wis. 87; *O'Brien v. C. & N. W. R. Co.* 92 Wis. 340; *Kruse v. C., M. & St. P. R. Co.* 82 Wis. 568.

2. The question of plaintiff's contributory negligence also, we think, should have been left to the jury. His knowledge, actual or imputed, of the likelihood of an immediate coupling, is by no means clear, though, of course, he must have known that such event would occur before very long. There is evidence tending to show that his stoppage in the aisle for conversation was but momentary. Again, the question is present whether his position was such as to render likely an injury if the coupling were made with ordinary care, or was perilous only in the event, not to be anticipated, of a negligently violent one.

The nonsuit was improper.

By the Court.— Judgment reversed, and cause remanded for a new trial.

WARD, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

January 11 — February 21, 1899.

Railroads: Injury to passenger standing on platform: Contributory negligence: Assumption of risk: Instructions to jury: Proximate cause: General and special verdict.

1. A railway passenger is not, as matter of law, guilty of negligence in standing on the platform of a car, even while it is in motion, if there is no room inside. If on boarding a car he finds it so crowded that he cannot get inside without the use of main force, and concludes to ride upon the platform, the question whether he is guilty of contributory negligence, or has assumed the extraordinary risks of that position, is one for the jury under proper instructions.

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2. A passenger on an excursion train is entitled to just as much care for his safety as one upon a regular train. In riding upon a crowded train he assumes the inconveniences resulting from its crowded condition, but not any increased risk.
3. In an action for injuries received by a passenger while standing on the platform of a railway car, a question in the special verdict being as to whether the negligence of defendant's employees in coupling the car was the proximate cause of the injuries, it was error to refuse an instruction, asked by defendant, that the jury must answer such question "No" unless they were satisfied to a reasonable certainty, from the greater weight of evidence, that it should be answered "Yes,"—the substance of such instruction not being given in the general charge.
4. An instruction to the effect that the expressions "proximate cause" and "direct cause" are equivalent and mean the immediate or inducing cause, was erroneous.
5. Where the questions submitted to the jury for a special verdict cover all the material, controverted issues of fact, the ruling of the court in refusing to submit more specific questions will not be reversed save for an abuse of discretion.
6. The object of a special verdict is to obtain from the jury answers to certain questions of fact, without regard to their legal effect upon the rights of the parties, and thus to obtain a result as far as possible free from sympathy and prejudice. The requiring of a general verdict also, and giving full instructions applicable to a general verdict, tends to defeat such object, and, if objections are duly made, is a material error.

APPEAL from a judgment of the circuit court for Rock county: JOHN R. BENNETT, Circuit Judge. *Reversed.*

This was an action to recover for personal injuries suffered by the plaintiff while riding upon a passenger train of the defendant. The evidence showed that on the 10th day of June, 1896, the plaintiff, who lived at Orfordville, Rock county, in this state, bought a ticket entitling him to passage over the defendant's railway to Janesville, and return. The ticket was sold at excursion rates because upon that day there was a picnic of the association known as the Modern Woodmen at Janesville, and the defendant company advertised excursion rates therefor. Upon the day in

question one train, comprising several cars, passed through Orfordville without stopping; but it was followed by another train of four or five cars, which stopped, and the plaintiff got upon that train. The evidence shows that he got upon the last car of the train, and that it was somewhat crowded, both in the seats and in the aisle, but that he succeeded in getting in the inside of the car at first. After he got in, he claims that others came in, and that he gave up his place to ladies, and was forced to stand in the front doorway of the car. He further claims in his testimony that, when the train arrived at Hanover and stopped, some people came out of the car and forced him onto the platform, and that he could not return into the car; that while he was so standing upon the platform the conductor came along and took his ticket, and just after he had taken his ticket another passenger car was attached to the end of the train with such great force that it threw him from his feet, and a part of his foot was caught between the bumpers of the car on which he was standing and the car immediately ahead of it, whereby he lost several toes.

The grounds of negligence claimed by the plaintiff were that the railroad furnished an insufficient number of cars, and also that the coupling was negligently and carelessly made. On the other hand, the defendant claimed contributory negligence on the part of the plaintiff in standing on the platform of the car, and denied any negligence on its part.

At the close of the evidence the defendant demanded a special verdict, and submitted questions therefor; and the court, while granting the request, decided that a general verdict should be found also, to which decision the defendant excepted. Thereupon the court submitted five questions to the jury as and for a special verdict, with some instructions adapted to each question, and then proceeded to give the jury a separate and independent charge, comprising

more than eight printed pages of the record, and applicable only to a general verdict.

The verdict rendered by the jury was as follows: "(1) Were the employees of the defendant company guilty of any negligence in coupling on the car at Hanover? *A.* They were. (2) If you answer the first question in the affirmative, then was such negligence the proximate cause of the injury which the plaintiff received on the occasion in question? *A.* It was. (3) Was the plaintiff in the exercise of ordinary care at the time he received the injuries complained of? *A.* He was. (4) Was the plaintiff guilty of any negligence directly contributing to the injuries which he received? *A.* He was not. (5) What damages did the plaintiff sustain in consequence of the injuries which he received? *A.* Five hundred dollars ($500). (6) We, the jury duly impaneled to try the issue in the above-entitled action, find for the plaintiff, and assess his damages at the sum of five hundred dollars ($500)."

Upon this verdict judgment was rendered for the plaintiff, and the defendant appeals.

C. H. Van Alstine, counsel for the appellant.

For the respondent there was a brief by *E. D. McGowan* and *M. G. Jeffris*, and oral argument by *Mr. Jeffris.*

WINSLOW, J. 1. It was argued in the present case that the evidence conclusively showed the plaintiff guilty of contributory negligence, because he was on the platform of the car when the accident occurred. It has been frequently held that a passenger who voluntarily and unnecessarily rides upon the platform of a railway car assumes the risks which necessarily attend that exposed position; but, on the other hand, it has also been held that a passenger is not, as matter of law, guilty of negligence in standing on the platform of cars, even while in motion, if there is no room inside; nor is such passenger required to totally disregard the courtesies of life, by violently pushing and crowding his way by main

force through a crowd of people in order to reach the inside of the car. Fetter, Carr. Pass. § 167. Such a rule would make the question of negligence depend upon the brute strength of the passenger. If the car be so crowded that a reasonably prudent man would conclude that he could not get inside without unreasonably pushing and crowding his way by main force, and so would conclude to ride upon the platform, the question as to whether he is guilty of contributory negligence, or has assumed the extraordinary risks of that position, is one for the jury, under proper instructions. The evidence was sufficient in the present case to carry the question to the jury, under the above rule.

2. The second question of the special verdict was whether the negligence of the defendant's servants in coupling the car (if any such negligence had been proven) was the proximate cause of the plaintiff's injuries. In connection with this question the defendant asked an instruction to the effect that the jury must answer it "No," unless they were satisfied to a reasonable certainty, from the greater weight of evidence, that it should be answered "Yes." This instruction was refused; nor was its substance given in the general charge. The instruction was correct and its refusal was error. *Pelitier v. C., St. P., M. & O. R. Co.* 88 Wis. 521.

3. In connection with the same question the court charged the jury as follows: "The second question is: If you answer the first question in the affirmative, then was such negligence the proximate cause of the injury which the plaintiff received on the occasion in question? *The word 'proximate' means the direct cause,* and *the words 'direct cause' are equivalent to the words 'proximate cause.'* And, if you answer the first question in the affirmative, then you are to say whether that negligence was the proximate cause of the injury which the plaintiff received on the occasion in question. If you find that was the proximate cause, you

will say it was. If you find it was not the proximate cause, you will say it was not." Plaintiff's counsel thereupon addressed the court as follows: "I ask the court to charge the jury that the words proximate cause have a settled legal definition, in connection with actions for negligence, and mean the immediate and inducing cause of the injury. *Court:* That is correct. *Proximate cause means the immediate or inducing cause of the injury. I used the word 'direct,' but that means the immediate and inducing cause.*"

The defendant duly excepted to the definitions of proximate cause so given, and it is clear that, under the long line of decisions in this court on that subject, such definitions were erroneous. The subject has been so recently and fully discussed by Mr. Justice MARSHALL in *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, that further discussion here is unnecessary.

4. The third and fourth questions asked the jury whether the plaintiff exercised ordinary care or was guilty of contributory negligence. In connection with these questions the defendant asked the following instruction, which was refused: "A passenger taking a crowded excursion train takes it with the increased risk and diminution of comfort incident thereto, and you are to consider this proposition of law in determining your answers to the third and fourth questions."

We have been referred to no case which holds that a passenger on an excursion train is not entitled, as matter of law, to expect just as much care to be exercised for his safety as a passenger upon a regular train, and we do not think such is the law. This instruction is capable of being so construed, and hence we think it was properly refused. Doubtless a passenger, when he rides upon a crowded train, assumes the inconveniences resulting from its crowded condition, but he cannot properly be said to assume any increased risk; nor

can the company be held to any less degree of care from the mere fact that the train is crowded, or the fact that it is an excursion train and not a regular train.

5. Error is assigned because the court did not submit to the jury a large number of questions presented by the defendant as a part of the special verdict. As will be seen by reference to the special verdict, the questions submitted by the court were five in number, and covered the following points: (1) Was the coupling negligently made? (2) Was it the proximate cause of the injury? (3) Was the plaintiff exercising ordinary care? (4) Was he guilty of contributory negligence? and (5) What damages did he suffer? The court told the jury in his general charge that the only ground of negligence claimed by the plaintiff was negligence in the coupling of the cars, thus eliminating the question of the negligent furnishing of an insufficient number of cars from the case. Reference to the pleadings and evidence shows that the five questions above set forth fully cover the material issues of fact in the case. The plaintiff's claim was negligence in the coupling of the cars, proximately causing his injury. The defendant's claim was that there was no negligence in the coupling, but that the plaintiff was negligent in standing on the platform, and thereby contributed to his own injury. All these questions are covered by the verdict, beyond doubt. It is true that the questions are quite general in their nature, and require careful instructions to be given in connection with them, in order to insure intelligent answers; but, as said in *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, the form of the questions must rest largely in the discretion of the trial court, and, as in other cases of discretionary action, the ruling of the court below will not be reversed, save for abuse of such discretion. Now, while the trial court in the present case might with propriety have submitted to the jury the question whether the plaintiff voluntarily stood upon the platform, or whether by ordinary effort

and diligence he could have found room in the car, we cannot say that it was error to cover those questions by the general question concerning contributory negligence. *Schumaker v. Heinemann*, 99 Wis. 251; *Raymond v. Keseberg*, 98 Wis. 317. The defendant submitted twenty questions covering very minutely the conduct of the various trainmen, and what they ought to have anticipated, and what the plaintiff ought to have anticipated, some of the questions being quite long and complicated. It would have been nearly or quite a cross-examination of the jury, and such is emphatically not the purpose of the special verdict. The purpose of the special verdict is to obtain separate findings upon the *material, controverted issues*, but not to settle every question upon which witnesses differ in the course of a trial; and it is also its purpose to obtain these findings in answer to a few questions, rather than in answer to many. The greater the number of questions, the greater the opportunity for inconsistency in answers, resulting in mistrials and miscarriages of justice. While such results may gratify the defendant, they are not the results which the court and the law seek. We find no reversible error in the form of the special verdict, nor in the refusal to incorporate the questions submitted by the defendant in it.

6. A question remains to be considered which is of greater importance and difficulty than those previously discussed in this opinion. After the special verdict was requested and allowed, the court announced that a general verdict would be required also, to which ruling of the court the defendant's counsel excepted. The court, then, after submitting the questions of the special verdict, with some special instructions as to each question, gave to the jury an independent charge, covering some eight pages of the printed case, and going over the legal questions arising in the case in a form suitable only to a general verdict, and telling the jury under what circumstances the plaintiff could recover and under

what circumstances he could not recover; and to many of these propositions exception was taken. That this is the very thing which the special verdict is intended to prevent is evident from the law itself. The special verdict was expressly intended to submit to the jury for answer certain questions of fact, which they are to answer from the evidence, guided by instructions appropriate to the questions only, without regard to the legal effect of their answers upon the ultimate question of the rights of the parties. Thus, it was expected and intended to relieve the jury from all consideration as to whether their answers are consistent with a general recovery by either party, and thus to obtain a result as far as possible free from sympathy or prejudice.

With the wisdom of the law we have nothing to do. Properly used, it secures to parties a valuable right, and it should be carried out by the courts in such manner as to effectuate its purpose, if possible. That the submission of general propositions of law, suitable only to the case of a general verdict, tends to defeat the purpose of the law, has been frequently held by this court. *Ryan v. Rockford Ins. Co.* 77 Wis. 611; *Reed v. Madison*, 85 Wis. 679; *Coats v. Stanton*, 90 Wis. 130; *Conway v. Mitchell*, 97 Wis. 290; *Kohler v. West Side R. Co.* 99 Wis. 33.

The question of the propriety of submitting a general verdict side by side with a special verdict has been quite frequently referred to, and it must be admitted that the previous expressions of the court are not in entire harmony. Thus, it was said in *Davis v. Farmington*, 42 Wis. 425, very correctly, in substance, that a party is entitled, as matter of right, to have a special verdict containing a specific finding on every material issue, and that a want of this cannot be cured by a general verdict. But it was also said in that case that, where a special verdict is returned, there may be a general verdict also; citing R. S. 1858, ch. 132, sec. 14, and *Lemke v. C., M. & St. P. R. Co.* 39 Wis. 449. This latter

question does not seem to have been raised by any objection or exception in that case, nor does the proposition seem to be supported by the authorities cited. In the *Lemke Case* it was simply held that a special verdict inconsistent with the general verdict would control, no question being raised as to the propriety of submitting a general and special verdict together. The section of the statute cited (sec. 14, ch. 132, R. S. 1858, now the last sentence of sec. 2860, Stats. 1898) provides that, "when a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter." It seems to us very plain that this provision refers, not to a special verdict, but to those special findings of fact which may or may not cover the whole case, and which the court may, of its own motion, submit to a jury in connection with the general verdict. R. S. 1858, ch. 132, sec. 11; Stats. 1898, sec. 2858. But while this proposition seems not to have been called for in the case and not founded upon sound authority, still it is not to be denied that it has been repeated in various cases, in substantially this form, that, while a general verdict is unnecessary in connection with a special verdict, the mere fact of its submission is not error, as it harms neither party. If it is inconsistent with the special verdict, the special verdict prevails; if consistent, it is a mere harmless legal conclusion. Thus, in either case it is useless. *Ault v. Wheeler & W. Mfg. Co.* 54 Wis. 300; *Hoppe v. C., M. & St. P. R. Co.* 61 Wis. 357; *Cooper v. Ins. Co. of Pa.* 96 Wis. 362. The practical inconsistency of these decisions is manifest. It is held that instructions on general legal propositions are not proper and may be error; but it is also held that the submission of a general verdict in connection with the special verdict is not error. Certainly, if it is not error to submit a general verdict, it ought not to be error to give appropriate instructions upon it, and yet this very action has been held error.

The present case is a striking instance of the effect of sub-

mitting a special and general verdict together. The special verdict is briefly disposed of by the charge of the court, with a few general propositions, while the general verdict is made the principal feature of the case, and completely dwarfs the special. While this course finds implied, if not direct, support in decisions of this court, it is certainly plain that the whole purpose and intent of the law is liable to be thwarted by it; and we have, after mature deliberation, determined that it ought not to be tolerated. We do not decide that it is error to submit a general verdict in connection with the special verdict, where there is no objection and there is no general charge given, though such practice is not to be encouraged and is not in harmony with the intent of the law; but we hold that such a course is error in a case where objection is duly taken to the submission of a general verdict in connection with the special, and where the court gives full instructions on the general propositions of law involved, thus plainly informing the jury of the effect of their answers to the special questions, and how to make such answers consistent with the general verdict, especially where exception is taken to such general instructions.

So far as this rule is inconsistent with expressions contained in previous decisions of this court, they must be considered as overruled or modified in accordance herewith.

In connection with this subject, it may be proper to notice a class of cases in this court which seem to intimate that a defective special verdict may be helped out by a general verdict. Of this class is *Hutchinson v. C. & N. W. R. Co.* 41 Wis. 541, where it is said that, "in the absence of a general verdict, the special findings should include all the material issues made by the pleadings." See, also, *Eilert v. G. B. & M. R. Co.* 48 Wis. 606. There is also another class of cases which hold or intimate that where a special verdict is demanded, and all the issues are not covered by the special questions, but no objection is made on that ground, and a

general verdict is returned under correct instructions, the irregularity is waived; thus holding, in effect, that a general verdict may help out a defective special verdict. *Schultz v. C., M. & St. P. R. Co.* 48 Wis. 375; *Sherman v. Menominee River L. Co.* 77 Wis. 14; *Klatt v. N. C. Foster L. Co.* 92 Wis. 622.

How far these cases can be harmonized with the statute and the cases which hold that a party demanding a special verdict has an absolute right to a special finding on each material question (*Davis v. Farmington*, 42 Wis. 425; *F. Dohmen Co. v. Niagara F. Ins. Co.* 96 Wis. 38), or with the propositions determined in this case, seems a question of considerable difficulty. This question is not before us, and hence we cannot decide it; but we call attention to the seeming difficulty, in order that it may be avoided in future cases, as it may easily be by the exercise of care in covering all material issues by the questions of the special verdict.

We find no other questions that require discussion.

By the Court.—Judgment reversed, and action remanded for a new trial.

BARDEEN, J., took no part.

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BAKER, Appellant, vs. BAKER and others, Respondents.

January 14—February 21, 1899.

Wills: Undue influence: Fraud.

The evidence in this case—showing, among other things, that a testator was seventy-three years of age when he died; that he left a widow, his second wife, by whom he had no children; also a married son and daughter, children of his first wife, and several grandchildren, children of a deceased son; that until about six weeks before his death he appeared to have sufficient mental capacity to do business, but about three weeks later had become very feeble

and had difficulty in recognizing old acquaintances; that about ten days before his death he expressed a desire to make his will and give his wife his home farm for life or widowhood, together with the equipment to carry it on; that he grew weaker, and on the next day failed for some time to recognize a friend and when aroused said he did not know where he was; that on the following day he signed a paper in the nature of a will, nearly all written in pencil by his wife, giving to her his household goods absolutely, his farm and farming utensils as long as she should remain his widow, and full control of all notes and mortgages; that about three hours afterwards he signed the paper offered as his will, drawn by an unskilled neighbor, by which he gave to his wife all of his property, worth more than $30,000, except some trifling legacies; that the testator's children and grandchildren were then out of the state and did not know of his illness; that they afterwards learned of it, not from his wife, and when some of them came they were never left alone with him, but his wife or her sister was always present, and they did not learn of the alleged will until after his death,—is *held* to show that the alleged will was procured by undue influence or fraud.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

The opinion states the case.

M. L. Lueck and *Edwin F. Van Vechten*, attorneys, and *W. H. Timlin*, of counsel, for the appellant.

For the respondents there was a brief by *H. K. Butterfield, Sawyer & Sawyer*, and *J. E. Malone*, and oral argument by *Mr. Butterfield* and *Mr. E. W. Sawyer.*

CASSODAY, C. J. It appears from the record that, February 22, 1897, Dennison Baker died, leaving an instrument which the county court admitted to probate as his last will and testament, which, omitting the formal part, is as follows:

"First, I give and bequeath to my grandchildren Grace and Josie Rector the sum of $250 each within one year from the time of my demise.

"Second, I give and bequeath to my son *Adelbert Baker* the sum of $50.

"Third, I give and bequeath to my daughter *Ruby* the sum of $100.

"Fourth, I give and bequeath to my grandchildren *Adelbert*, *Frederick*, *Thomas*, *Alice*, and *George*, children of my son George, the sum of ten dollars each.

"And lastly, I give and bequeath to my wife *Nancy* all the rest of my real estate and personal property, of what nature or kind soever, and appoint her sole executor of my estate, without bonds.

"In witness whereof I have hereunto set my hand and seal the 15th day of February, 1897.

"D. BAKER. [Seal.]"

There was also an attesting clause, signed by J. W. Martin, C. E. Annis, and Rudolph Hermann.

On appeal from the county court, a trial was had by the circuit court and a jury, upon issues agreed upon and submitted, and at the close of the trial the jury returned a verdict to the effect that such paper writing was executed in conformity with the provisions of the statutes relating to wills; that the deceased did not have testamentary capacity at the time of the execution of the alleged last will and testament; that it was not his own voluntary act and deed, but was the result and product of undue influence. Thereupon the trial court refused to set aside such special verdict or any part thereof, but confirmed the same, and ordered and adjudged that the decree of the county court admitting to probate the alleged last will and testament be vacated, and the case be remitted to the county court for further proceedings therein in accordance with the judgment of the trial court; and from the judgment so entered the widow, *Nancy E. Baker*, brings this appeal.

It appears, and is undisputed, that Mr. Baker had resided in Wisconsin for more than fifty years; that he married his first wife soon after he came to the state; that he had by her four children,— two boys, George and *Adelbert*, and two

girls, Sarah and *Ruby;* that George and *Adelbert* both remained at home with him until they were over thirty years of age; that subsequently the two sons became residents of Missouri; that George died in Missouri in November, 1896, leaving five children, him surviving; that *Adelbert* lived there with his family at the time of his father's death, and had for more than ten years previously; that Sarah died in 1889, without issue; that *Ruby* was, at the time of her father's death, married and a resident of Minnesota, where she had lived with her family for several years; that in 1884 Mr. Baker's first wife, and the mother of all his children, died; that in 1888 he married the appellant, *Nancy E.*, but never had any children by her; that his eyesight had been poor for about five years before his death; that in 1895 he received an injury in his hip, by reason of his horse running away, which gave him a slow, shuffling gait; that his last sickness commenced in the latter part of December, 1896, or the first part of January, 1897; that January 10, 1897, he settled with the witness Eimer, a merchant who occupied a store building as his tenant, and on the next day, January 11, 1897, he made a new lease of the store to Eimer for the term of five years; that he then had sufficient mental capacity to do business; that his health gradually commenced to fail, especially in the latter part of January, 1897; that about February 1, 1897, he had become very weak, and failed to recognize the witness Wells, with whom he had long been well acquainted; that he gradually grew weaker from that time until the time of his death; that on Saturday, February 13, 1897, two days before making the alleged will, he recognized the witnesses Wells and Eimer with difficulty, and expressed a desire to make his will, and that he wanted his wife to have his home farm for her lifetime or as long as she remained his widow, together with the team and tools to carry on the farm; that the next day (Sunday) he was still weak, and for some time failed to recognize Eimer, and

when aroused he said he did not know where he was; that about 5 o'clock in the afternoon of the next day (Monday, February 15th), Mr. Baker signed a paper, all written in pencil by the appellant, *Nancy E. Baker*, except the clause relating to Heintz, which was underlined by the witness Martin at the request of Mr. Baker, and of which paper the following is a copy, to wit:

"Dennison Baker's last will and testament.

"The household goods and surroundings shall belong to my wife. The farm and farming utensils are to hers as long as she shall live or she remains my widow. The stock and barns shall be hers, and the farm shall be run as it is this year. All notes and mortgages she shall have full control of.

"That M. P. Heintz shall have the money on his mortgage, just as he has had it, as long as he wants it.

"AUGUST EIMER. [Signed] DENNISON BAKER.

"J. W. MARTIN,

"C. E. ANNIS."

It further appears that, in addition to such three subscribing witnesses and the appellant, there was present, at the time, the witness Wells, who expressly refused to sign the paper as a witness, after being requested by *Mrs. Baker*, on the ground that he did not think it was Mr. Baker's will; that at the foot of that paper so executed by Mr. Baker *Mrs. Baker* subsequently wrote, in pencil, the following memorandum: "Mr. Eimer asked if he understood it should be as long as she lives. Mr. Baker said 'Yes; as long as she lives, I want her to have it;'" that subsequently there was written, in pencil, on a separate piece of paper, a further memorandum, as follows, to wit: "Lastly, I give and bequeath to my *Nancy* all the rest of my real estate and personal property, of what nature or kind soever, and appoint her sole executor of my estate;" that about three hours after that first pencil paper was so signed by Mr.

Baker the alleged will in question was signed by him, and witnessed by J. W. Martin, C. E. Annis,—two of the persons who witnessed the pencil writing,—and also by one Rudolf Hermann.

That paper purports to give and devise to *Mrs. Baker* all of her husband's property, except some trifling legacies amounting to $700. In other words, as seems to have been conceded, that paper purported to give *Mrs. Baker* some $30,000 more than she would have obtained under the statutes. Mr. Baker was at the time about seventy-three years of age. He had, several years previously, given considerable money to each of his children. When the alleged will was drawn, all his children and grandchildren then living were either in Missouri or Minnesota. None of them had knowledge of his sickness until after the making of the alleged will, and then received the information from others than the appellant. It was not drawn by a person living near, who was in the habit of drawing his papers, but by the witness J. W. Martin, who lived two and one-half miles distant, and who admits that he had never drawn a will before, and but very few other papers. *Mrs. Baker* drew nearly all of the first paper, and manifestly had more or less to do about drawing the alleged will. She was the dominant force in the household at the time. Her sister was with her. Mr. Baker seems to have been in a passive condition, saying but little more than yes or no. After *Ruby* and *Adelbert* came, neither of them was left alone with their father, but *Mrs. Baker* or her sister was at all times present. Neither of them had any information respecting the alleged will until after the death of their father. After the arrival of *Adelbert*, *Mrs. Baker's* sister took the alleged will to the house of the witness Martin for safe keeping. The conduct of *Mrs. Baker*, and the circumstances surrounding the making and execution of the alleged will, were more or less suspicious, and called for explanation on

her part. The jury were clearly justified in finding that the paper writing was not the voluntary act of Mr. Baker.

From a careful examination of the evidence, we are forced to the same conclusion reached by the trial court, and that is that the alleged will was either procured by undue influence, or that a bold fraud was practiced upon the deceased. This conclusion is supported by numerous adjudications of this court. *Disch v. Timm*, 101 Wis. 179, and cases there cited. The question involved was purely one of fact for the jury and trial court. They decided it according to the clear preponderance of the evidence.

By the Court.—The judgment of the circuit court is affirmed.

BARDEEN, J., took no part.

The appellant moved for a rehearing and modification of the decision so that the same should provide that the costs and expenses of the appellant on the appeal to the supreme court, and a reasonable sum for counsel fees, be allowed by the county court, to be paid out of the estate.

The motion was denied April 4, 1899.

THE STATE EX REL. CHICAGO & NORTHWESTERN RAILWAY COMPANY VS. BURNELL, Circuit Judge.

102 232
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January 31—February 21, 1899.

Certiorari: *Effect of* supersedeas: *Bill of exceptions.*

A writ of *certiorari* does not vacate the order or judgment challenged thereby, but merely suspends its execution. It does not prevent the giving of notice of the entry of the judgment or order for the purpose of setting the time running within which a bill of exceptions must be settled.

MANDAMUS to the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Writ dismissed.*

Proceedings commenced in this court to compel the respondent to sign and certify a bill of exceptions.

An order was made granting the prayer of a petition, filed in the circuit court for Winnebago county, for the appointment of commissioners in condemnation proceedings. Thereafter such proceedings were removed to this court for review pursuant to a writ of *certiorari.* A copy of the order in the condemnation matter, and notice of the entry thereof, were served so as to set the time running for the railway company to settle a bill of exceptions. Later, the writ of *certiorari* was quashed. Subsequent to the quashing of the writ, a bill of exceptions was prepared on behalf of the relator, and all steps requisite to the signing and certifying of it by the circuit judge complied with, unless the relator was too late therewith because of the service of the copy of the order and notice of the entry thereof, before mentioned. The circuit judge held that the bill came to him too late and refused to sign it. An alternative writ of *mandamus* was sued out of this court, requiring the judge to sign the bill or show cause to the contrary. Due return was made to such writ, assigning as the reason for not signing the bill that the time therefor expired before such bill was presented for settlement. The relator demurred to the return, and the issue thus formed was submitted to the court for determination.

For the relator there was a brief by *Fish, Cary, Upham & Black,* and oral argument by *R. N. McMynn.* They contended, *inter alia,* that the writ of *certiorari* removed the condemnation proceedings, record and all, bodily from the circuit court to the supreme court and suspended the powers of the circuit court as to such proceedings. All attempted subsequent proceedings in that court pending the *certiorari* would be *coram non judice* and void. *Case v.*

Shepherd, 2 Johns. Cas. 27; *Patchin v. Brooklyn*, 13 Wend. 664; *Cross v. Smith*, 1 Salk. 148; *Neuman v. State*, 76 Wis. 112; *McCormick H. M. Co. v. Reed*, 85 Wis. 201, 202; *Wallace v. Wallace*, 13 Wis. 224, 227.

Miller, Noyes, Miller & Wahl and *Eaton & Weed*, respondent's attorneys. [No brief on file.] The cause was argued orally by *H. I. Weed.*

MARSHALL, J. A writ of *certiorari* suspends the execution of the judgment or order challenged thereby. It does not vacate such judgment or order. Pending the hearing, such order or judgment remains in full force the same as in case of an appeal where the statute regarding a stay of proceedings has been complied with. In case of an appeal, the record may be retained in the court below and a certified copy be sent to this court; in case of a writ of *certiorari* the same course may be pursued, in fact is required to be pursued, unless an order be entered to the contrary. See Supreme Court Rule IV. The idea that a *supersedeas* vacates the order or judgment of the lower court pending the hearing in the court above, has no place in our system. The sole effect of it is to prevent any act being done to enforce the judgment or order affected by the stay. Notwithstanding the *supersedeas* or stay, the judgment or order may be pleaded or given in evidence in bar or as an estoppel, or the judgment debtor may be garnished, or any other proceedings be taken not inconsistent with the dormant status of the judgment so far as its enforcement is concerned. *Neuman v. State*, 76 Wis. 112; *Richter v. Leiby*, 99 Wis. 512; *State v. Madison*, 63 Me. 546.

It follows that the giving of a notice of the entry of a judgment or order, so as to set the time running within which to settle a bill of exceptions, is not a proceeding to enforce such order or judgment, and is not prevented by the issuance and service of a writ of *certiorari* to test the valid-

ity of such order or judgment. That is ruled by *Sexton v. Pickett*, 24 Wis. 346. The circuit judge relied upon the decision in that case in refusing to sign the bill of exceptions. No reason is perceived why the decision in that case, and the facts alleged in the return, are not a complete answer to the alternative writ of *mandamus*. They are so considered.

The result is that the demurrer to the return to the alternative writ must be overruled, and judgment be entered dismissing such writ and for costs to be taxed against the relator.

By the Court.— It is so ordered.

SHORES LUMBER COMPANY, Appellant, vs. CLANEY and others, Respondents.

January 31—February 21, 1899.

Sale of lumber: Rescission for failure of title: Nonperformance of contract: Excuse.

1. By a contract indicating a present sale of lumber by plaintiff to defendants, the latter agreed to give their note for a part of the price and to pay the balance after plaintiff had carried the lumber for them to Chicago. Learning, however, that the title was still in plaintiff's vendor of the timber from which the lumber had been sawed, who had not been fully paid, defendants refused to give the note when demanded unless plaintiff would clear the title or give a bond for delivery of the lumber free from liens. Plaintiff refused to do either, and soon after removed defendants' mark from the lumber and sold it to other persons. *Held*, that the contract had been rescinded.
2. It was immaterial, in such case, that plaintiff's vendor permitted it to sell lumber before making payment, if no such claim was made when defendants refused to give the note and no information to that effect was ever given them.
3. Where, in such case, the carriage of other lumber belonging to defendants to market was made a condition precedent to the taking effect of the sale, the performance of that condition by plaintiff,

for which it was fully paid, did not preclude the defendants from rescinding the sale for failure of title.

4. The nonperformance of an agreement to transport lumber to market on the first trip made in the spring is not excused by the fact that there was ice near the dock which prevented getting at it handily.

APPEAL from a judgment of the circuit court for Ashland county: E. W. HELMS, Judge. *Affirmed.*

On November 22, 1895, the parties to this action made a contract, in which it was recited "that the said *Shores Lumber Company* have this day sold and delivered" to the defendants 850,000 feet of lumber piled on their dock at Ashland, at $7.75 per thousand feet. The defendants were to give their paper for $6,000, due March 18, 1896, and pay the balance due for the lumber when the same was delivered in Chicago. Plaintiff was to carry the lumber to Chicago at going freight rates, the first trip made in the spring of 1896. The contract further provided that plaintiff was to carry about 850,000 feet of other lumber, owned by defendants, from Ashland to Chicago, that fall, if the boats could make the trip, and in case the lumber was not delivered then the agreement to purchase the lumber first mentioned was to be void.

The complaint alleges the making of the contract, the carriage by plaintiff of so much of the defendants' lumber as was tendered it to carry, the refusal of defendants to make and deliver their note, and their refusal to receive any of the lumber purchased by them, although plaintiff carried the same to Chicago as agreed, and tendered the same to defendants. The complaint further states that plaintiff was compelled to sell said lumber in market, and did so sell it at the best advantage, and received therefor eighty-seven and one-half cents per thousand less than the contract price.

The answer admits the making of the contract, and alleges that after the execution thereof the defendants learned that plaintiff was not the owner of the said lumber and had no

right to sell the same, and that thereupon they refused to give their note as mentioned in the contract, unless the plaintiff would make the title good, which was not done. The other matters stated in the complaint were denied.

After hearing the evidence, the court directed a verdict in favor of defendants, on the ground that the evidence showed that the contract had been rescinded by the parties. A motion to set aside the verdict and for a new trial was denied, and the plaintiff appeals from the judgment for costs.

For the appellant there was a brief by *Cate, Sanborn, Lamoreux & Park*, and oral argument by *A. W. Sanborn*. They argued, among other things, that the contract was executed on the part of the plaintiff by carrying the agreed lumber to Chicago, so that it could not be rescinded. Defendants could not rescind unless they placed the plaintiff *in statu quo*. *Simmons v. Putnam*, 11 Wis. 193; *Williams v. Ketchum*, 21 Wis. 432; *Herman v. Gray*, 79 Wis. 182; *Miller v. Palmer*, 95 Wis. 526; *Blake v. Pine Mountain I. & C. Co.* 76 Fed. Rep. 624. They gave no notice within a reasonable time of an intention to rescind. *South Milwaukee B. H. Co. v. Harte*, 95 Wis. 592.

For the respondents there was a brief by *Gleason & Sleight*, and oral argument by *E. F. Gleason*. They contended that a breach of the implied warranty of title arose immediately upon the sale, for which the defendants had a right to rescind. *Edgerton v. Michels*, 66 Wis. 124; *Hodges v. Wilkinson*, 17 L. R. A. (N. C.), 545; *Perkins v. Whelan*, 116 Mass. 542; *Grose v. Hennessey*, 13 Allen, 389; *Lewellen v. Crane*, 113 Ind. 289. They did rescind within a few days after they learned of the defect of title. The carrying of the other lumber to Chicago had nothing to do with the sale and delivery of this.

BARDEEN, J. The undisputed evidence shows that the lumber mentioned in the first clause of the written contract was

manufactured from what were known as the Stocking logs. The timber from which this lumber was sawed was purchased by plaintiff under two contracts with Mr. Stocking, which provided that plaintiff was to cut the timber and saw the logs at Ashland. No lumber was to be shipped until the full purchase price for the timber was paid, but plaintiff was allowed to ship a part of the lumber of an average quality upon payment of $5 per thousand feet for the part shipped. The title and right of possession of the timber and lumber were to remain in Stocking until the purchase price was fully paid. Upon payment and the performance of the conditions of the contract, Stocking was to give a bill of sale of the lumber. The second contract recites a breach of the first contract by plaintiff, and grants an extension of time for the payment of the amount then due, but reserves the title and right of possession of the lumber in the vendor until the full payment of the purchase price.

The lumber in question consisted of twenty-two piles, located on plaintiff's dock at Ashland. Immediately after the execution of the contract in suit, all of said piles were marked with the defendants' mark, and a list of the piles and an estimate of the amount thereof was made. On December 5, 1895, and before defendants had executed the note mentioned in the contract, Stocking's agents notified defendants of his claim on the lumber, and that he would not waive his claim thereon, but would demand $5 per thousand before it left the dock. On December 6th or 7th following, plaintiff's agent demanded the note that was to have been given for the lumber from defendants. He was then notified of the claim made by Stocking, and informed that, unless plaintiff cleared the title or gave a bond for a delivery of the lumber free and clear of all liens, the note would not be given and the trade would be declared off. The agent, however, denies that anything was said about declaring the trade off. He refused to give a bond; defendants refused to give the

note; and nothing further was done in regard to the matter at that time. Shortly afterwards the marks of the defendants on these piles were planed off by plaintiff; a bill of sale of the lumber was made to Wilkinson & Co., and possession of the same turned over to the vendee. The interest of Wilkinson & Co. was subsequently assigned to the Manistee National Bank, and one cargo of this lumber, when shipped in the spring, was carried as the lumber of the bank, as is shown by the bills of lading.

Upon this state of facts the court directed a verdict for the defendants, basing his ruling upon the ground that the contract of sale had been rescinded. Unquestionably, under the evidence, the title and right of possession of this property were in Stocking. There is no pretense that defendants had any knowledge or information of the true situation. They were dealing with plaintiff on the basis that it had title to the property. The general rule in this country is that, where there is a sale of chattels in the vendor's possession at a fair price, there is always an implied warranty of the title, unless the facts and circumstances surrounding the transaction are such as to warrant a different conclusion. *Edgerton v. Michels*, 66 Wis. 124; *Marshall v. Duke*, 51 Ind. 62.

The wording of the contract indicates a present sale of the property, and the evidence shows an attempt to deliver immediate possession. Before the delivery of the note for the purchase price by the purchasers, the true owner of the lumber notified them of his claim thereon, and that he would not waive it without payment. Certainly, defendants were justified in refusing to make payment, under the circumstances in proof, unless plaintiff cleared the title to the lumber. Whether we consider Stocking's title an absolute or defeasible one does not change the situation. The contract of the parties, and their acts under it, indicating an attempt to make a present sale and delivery of the lumber, the vendor

could not lawfully compel the vendees to pay for property to which it had no title, or which was incumbered by liens or mortgages. The defendants offered to carry out the deal if plaintiff would satisfy the Stocking claim or give a bond to save them harmless. This the agent refused to do, and the defendants refused to give the note. Soon afterwards plaintiff removed the marks put on the lumber by the defendants, and either sold or mortgaged the same to Wilkinson & Co.,—an act distinctly hostile to the defendants' interest. This course of conduct can only be justified on the theory that plaintiff believed the trade with defendants had been declared off. An act more inconsistent with the claim that this lumber had been sold to defendants could hardly be imagined. Taken in connection with the talk had between the parties at the time the notes were demanded, we think there was ample ground for the conclusion arrived at by the court.

The contention that defendants could not rescind the contract, because plaintiff had carried out that part of it in relation to transporting the defendant's lumber to market, is of no importance. This clause in the contract as to the transportation of this lumber was merely a condition precedent to the taking effect of the other provisions of the contract relating to the sale of the lumber in suit. Plaintiff was fully paid for its services, and seeks no relief in this action on account thereof.

The witness Shores was asked the following question on the trial, to which an objection was sustained: "State whether or not you were permitted by Stocking or his agent to ship and sell lumber before you made payments." The question fixes no time and has no reference to the lumber in controversy. No such claim was made when defendants refused to give their note, nor is it pretended that any information to that effect was ever given them. With that idea in view, the testimony sought to be secured became im-

material. Other rulings on testimony are so inconsequential as not to require special mention, and are not considered error.

Plaintiff alleges performance of all the conditions of the contract on its part. One of the provisions was that it should carry this lumber the first trip made in the spring; yet the uncontradicted evidence is that it only shipped a portion of it, and its excuse is that there was ice near the dock, that prevented getting at it handily. If delivery and tender of this lumber to defendants were essential to plaintiff's recovery under the contract, its failure to do so without excuse would be fatal to this action.

In either view of the case, the plaintiff is without a right of recovery under the proof.

By the Court.—The judgment of the circuit court is affirmed.

PARISH, Respondent, vs. MCPHEE, Appellant.

January 31—February 21, 1899.

Sale of timber: Contract construed.

1. Under a contract by which defendant was to pay a certain price for timber to be "furnished" by plaintiff, the latter is not entitled to recover the full contract price for timber which, after she had cut it, was found to belong to the United States, and for which defendant was compelled to pay the government, but defendant should be credited with the amount paid to the government,
2. At the time of making such contract defendant was negotiating for the purchase of certain lands, and instructed plaintiff to cut the timber therefrom, and afterwards purchased and became the owner of such timber. *Held*, that this timber was not "furnished" by plaintiff under the contract, and that she could recover the contract price therefor only after crediting defendant with the value of the stumpage.

APPEAL from a judgment of the circuit court for Ashland county: O. B. WYMAN, Judge. *Reversed.*

On November 24, 1894, plaintiff and defendant entered into a written contract in legal effect as follows: The plaintiff thereby sold and conveyed to defendant all the merchantable pine timber on certain described lands and gave defendant the right to enter upon said lands and manufacture such portions of said timber as was fit therefor into "wany timber." Plaintiff agreed to cut into saw logs the remaining timber on said land, and to deliver the saw logs and "wany timber" on the lake at Big Bay, Madeline Island, prior to April 1, 1895. Defendant agreed to pay for such logs and timber $10 per thousand feet when delivered in the manner specified in the contract, and to complete the cutting of the "wany timber" prior to January 15, 1895. After providing for the method of scaling the timber, the contract contained the following provision: "It is further agreed by the parties hereto that in case said party of the first part [plaintiff] furnishes to the party of the second part any timber other than that above described, of a grade equal to or better than the above-mentioned timber, the party of the second part will accept the same upon the terms and conditions herein set forth." Under the contract, plaintiff also sold to defendant certain hemlock boom sticks at the rate of $5 per thousand feet.

At the time this contract was made, plaintiff had an agreement with one Lamoreaux to sell her the timber on certain lands claimed by him under an allotment from the United States, and also an agreement with one Seim, a homesteader, for timber on his homestead. It afterwards appeared that neither party had any right to sell their timber, and, after it had been cut, it was seized by the United States, and defendant paid for the same at the rate of $6 per thousand feet.

Plaintiff and defendant's men cut and put in the timber on plaintiff's land, and also on the lands of Lamoreaux and Seim. They also cut quite a large quantity of timber upon

lands adjoining plaintiff's homestead, to which she had no title. The total amount of pine cut was 253,820 feet, and hemlock 43,000 feet. Of this amount, 24,950 feet came from Seim's homestead, and 65,740 feet from the Lamoreaux claim. The remainder was cut on plaintiff's homestead and adjoining lands, to which defendant afterwards acquired title. While the court made no finding as to the fact, the evidence fairly shows that the pine cut on the plaintiff's homestead amounted to about 65,000 feet, and that the greater part of the hemlock came from the same land. After the logs were delivered, the plaintiff brought this action to enforce a lien upon said logs for the purchase price unpaid. Defendant gave a bond, and took possession of the logs. The case was tried before the court without a jury, and findings made in favor of plaintiff for the amount of her claim, less the amount paid by defendant to the government for the timber cut on the Lamoreaux and Seim lands, and payments made on the contract.

The defendant appeals from the judgment entered upon the findings so made.

For the appellant there was a brief by *W. W. O'Keefe*, attorney, and *Gleason & Sleight*, of counsel, and oral argument by *E. F. Gleason*.

For the respondent there was a brief by *Cate, Sanborn, Lamoreux & Park*, and oral argument by *B. B. Park*.

BARDEEN, J. Upon the argument, both parties asked the court to determine this case upon the merits, regardless of any technical questions which might be urged as to the right of the plaintiff to maintain this action, or as to any technical errors occurring on the trial. Ignoring all questions of that nature, we shall proceed to dispose of the case upon the evidence and findings of the court.

It developed upon the trial that the timber claimed to have been delivered by the plaintiff under her contract came

from four different sources: (1) From the plaintiff's homestead; (2) from land owned or acquired by the defendant; (3) from land allotted by the United States to the Indian, Lamoreaux; (4) from the Seim homestead. The timber cut from the plaintiff's homestead was expressly mentioned in their written contract, and there is no controversy but that she is entitléd to the contract price therefor. The timber cut upon the other lands was furnished under a clause in the contract which reads as follows: "It is further agreed by the parties hereto that in case the said party of the first part [plaintiff] furnishes to the party of the second part any timber other than that above described, of a grade equal to or better than the above-mentioned timber, the party of the second part will accept the same upon the terms and conditions herein set forth."

At the time this contract was made, plaintiff had a contract with Lamoreaux and Seim to purchase the timber on their lands. This fact was made known to defendant, and the parties apparently acted upon the assumption that both Lamoreaux and Seim had a lawful right to sell such timber. It appears, however, that neither had such right as against the government; and, after the same had been cut, the government officers took possession of the logs. The defendant arranged a settlement for the trespass, and paid the government at the rate of $6 per thousand feet for the timber so cut. The plaintiff claimed that these were logs "furnished" under the clause in the contract above quoted, and sought to recover the full contract price therefor; but the court very properly allowed the defendant the sum paid by him to the government. Both parties had full knowledge of the situation, and acted under the mistaken idea that the parties named had a right to sell said timber. No reason is perceived why the decision of the trial court was not an equitable adjustment of the matter.

As to the timber cut on the lands adjoining plaintiff's

homestead, known as the *McPhee* lands, the court finds that, at the time of the execution of the contract in suit, defendant was negotiating for the purchase of the same, and that he then, and at divers other times, "authorized and instructed" the plaintiff to cut said timber, and that he afterwards purchased and became the owner thereof. In his conclusions of law, however, he allows the plaintiff the full contract price for the timber so cut, regardless of the question of stumpage. He places it on the same foundation as the timber cut from her own lands. The facts found by the court are strenuously disputed by defendant. There is, however, evidence to support the findings; and the evidence against them is not so overwhelming that we feel justified in setting them aside. The court's conclusion of law, however, cannot stand. It works great injustice to defendant, in that it amounts to a donation of the stumpage to the plaintiff. When it was agreed that defendant would receive other timber furnished by plaintiff, it did not mean that she could trespass indiscriminately, and compel defendant to take logs to which she had no title, and claim the full contract price. It seems very plain that she could not compel defendant to take and pay for logs "furnished" by her, unless they were such as she owned and had a right to sell. The court therefore fell into error when he allowed plaintiff the full contract price for the timber cut on the *McPhee* lands. The exact amount of these logs is not separately found, but it is stated that the pine cut on plaintiff's homestead and the *McPhee* lands is 163,130 feet, and the hemlock 43,000 feet. The evidence shows that the pine timber cut on plaintiff's land was about 65,000 feet. It also shows that the greater part, if not all, of the hemlock was cut on her lands. Assuming these facts to be established as fully as though an express finding had been made, what ought to have been the ruling of the court upon the rights of the parties under the situation presented? The fact is undisputed that defendant

was negotiating for these lands at the time the original contract was made. The court has found, upon sufficient evidence, that defendant "authorized and instructed" the plaintiff to cut on these lands. Such authorization would seem to imply a promise on the part of the defendant to pay plaintiff for the work she was to do. The defendant having secured and paid for the stumpage, a just solution of the controversy would be to allow defendant the actual value of this timber. By so doing, neither party is allowed any advantage over the other. Plaintiff would thereby be paid for the work she had done, and defendant would secure pay for the stumpage value of the timber. Inasmuch as the evidence furnishes no basis upon which to compute the value of such stumpage, we have thought best to remand the case to the court below to take proof as to this one fact, on the basis that there was 98,130 feet of this timber. It fairly appearing from the evidence that the timber was not cut later than March 1st, interest should be allowed on such value from that date to April 1st thereafter. Judgment should then be entered for the plaintiff for $1,574.31, less this amount, with interest from April 1, 1895.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

WILLIAMS, Appellant, vs. WILLIAMS, Respondent.

January 31—February 21, 1899.

102 246
109 185

(1, 3) *Practice: Motion for new trial: Issues.* (2) *Fraud: Evidence.*

1. A motion to set aside a verdict and grant a new trial should state the grounds of the motion, and the record should show that it was made at the same term at which the trial was had.

2. In an action to recover moneys alleged to have been advanced by plaintiff for the purchase of securities which were assigned to the defendant, the plaintiff acknowledged that he received the money from the defendant's husband, since deceased, but claimed that it was paid to him by the deceased in satisfaction of a debt contracted seventeen years previously. *Held*, that such claim might be met by proof of the fact that plaintiff had for years been in straitened circumstances while the deceased had ample means and property, such evidence tending to show that the claim was fraudulent.

3. A plaintiff who, at the trial, bases his claim on facts different from those alleged in his complaint, thereby opening the door to an inquiry respecting such facts, cannot complain that the issue so tried was not within the pleadings.

APPEAL from a judgment of the circuit court for Ashland county: E. W. HELMS, Judge. *Affirmed.*

The issues in this action, as shown by the pleadings, may be stated as follows: That on October 18, 1894, acting for the defendant, plaintiff purchased from one John Thompson certain notes and a chattel mortgage of the Ashland News Company and others, and that he paid therefor, for the defendant, the sum of $1,517.50; that said mortgage was duly assigned to defendant, and that defendant had not paid the plaintiff therefor. The answer admits that defendant became the owner of said mortgage, but alleges that the consideration therefor was paid by one D. A. Williams, defendant's husband, and that, in an action instituted by her to recover possession of the mortgaged property, the plaintiff paid to her the sum of $1,088.34, the balance due thereon.

The chief question litigated on the trial was whether the money paid by the plaintiff for the assignment of this mortgage was the money of plaintiff, or money of his brother, D. A. Williams, defendant's husband. The plaintiff admitted that he received the money paid by him for the mortgage, from his brother, but claimed that it was paid to him on a debt his brother owed him, of some seventeen years' standing. Considerable testimony was given as to plaintiff's rela-

tions with his brother, and as to his financial standing, since the incurring of such alleged indebtedness.

The jury found a verdict for the defendant, and from the judgment for costs against him the plaintiff appeals.

For the appellant there was a brief by *Cate, Sanborn, Lamoreux & Park*, and oral argument by *A. W. Sanborn.*

For the respondent there was a brief by *Lamoreux & Shea*, and oral argument by *W. F. Shea.*

BARDEEN, J. The chief ground for complaint against the judgment in this action is that the verdict was against the evidence, and that the real issue in the case was obscured by the introduction of immaterial and irrelevant testimony. Unless it can be said that plaintiff was prejudiced by the introduction of improper testimony, he has no reasonable ground for complaint. There is ample evidence in the case to support the jury's conclusion. The point is made that this question is not before us, as not being raised by the record. The bill of exceptions shows that "plaintiff moved to set aside the verdict and grant a new trial," which motion was denied and excepted to. No ground for the motion is stated. Sec. 2878, Stats. 1898, would seem to contemplate that the grounds of the motion must be stated, and that the record should show that it was made at the same term at which the trial is had. Without determining whether an omission to state the grounds upon which a motion for new trial is based leaves the party without remedy, or whether a failure of the record to show that the motion was made at the same term at which the trial is had would be fatal, as against the motion, we suggest that proper practice demands that both those facts should appear. In view of what was said by this court in *Nisbet v. Gill*, 38 Wis. 657; and *Sloteman v. Thomas & W. Mfg. Co.* 69 Wis. 499, the necessity of stating the grounds of such motion would seem to be manifest.

The main question litigated on the trial was whether the money paid for the chattel mortgage in question was plaintiff's money or money belonging to his brother. The plaintiff admitted that the money paid for the assignment of this mortgage was received from his brother, defendant's husband. His claim was that his brother paid him this money on a debt incurred in 1876 and the following two years. The fact being admitted that the money paid for this mortgage was furnished by D. A. Williams, and that the assignment of the same was to his wife, the defendant, it devolved upon the plaintiff to show his title and interest. This he attempted to do by showing that the money used to pay for this mortgage was paid to him upon a debt over seventeen years old. The fact that D. A. Williams was dead, the venerable age of his alleged indebtedness, the fact that plaintiff had for years been in straitened financial circumstances, while his brother had ample money and property and might have paid him, coupled with the circumstances surrounding the parties for some years prior to this date, gave rise to a suspicion that his claim was fraudulent. The death of one of the parties to the transaction made it necessary for the defendant to meet the plaintiff's claim with proof of his financial condition and the circumstances and relations of the brothers during the time this debt was claimed to be a subsisting obligation. This was the best evidence possible under the circumstances. Considered in the light of the attendant facts, the claim was in itself suspicious. The defendant insisted that the claim was fraudulent. This court early adopted the rule that in cases involving fraud a considerable latitude should be allowed in the introduction of evidence. *Jones v. Lake*, 2 Wis. 210. And the court will at all times permit a full and exhaustive examination of the parties on all questions which have a bearing on the good faith of the transaction. *Kalk v. Fielding*, 50 Wis. 339.

But the plaintiff claims that these facts were beyond the issue made by the pleadings. He alleged that, acting as the agent of defendant, he advanced certain moneys to her use. When he comes to the proof, he denies the agency and claims that the transaction was his own, although admitting that the money paid came from his brother. To recover, he was compelled to show that *his* money paid for the mortgage, and in that way he opened the door to an inquiry as to the *bona fides* of his claim. The defendant has just ground to claim that the issue tried was not within the pleadings, but the plaintiff, having opened the door, is in no position to make complaint. We have carefully reviewed the testimony and the objections thereto raised by the plaintiff, and are unable to discover any reversible error.

By the Court.—The judgment of the circuit court is affirmed.

LITTLE, Respondent, vs. TOWN OF IRON RIVER, Appellant.

January 31—February 21, 1899.

102 250
113 *671

102 250
114 *595

102 250
c116 *272

Highways: Injuries from defect: Notice: Evidence: Instructions to jury: Exceptions.

1. In an action against a town for personal injuries alleged to have been caused by a defective highway, it was error to permit a witness, who stated that he had met with an accident at the same place some little time before plaintiff's accident, to testify that he had talked about it in the town, for the purpose of showing that the town board was chargeable with notice of the defect; but when it appeared on his cross-examination that one of the persons with whom he had talked was a member of the board the error became immaterial.
2. In such action a statement in the charge to the jury that there was no question, under the evidence, but that there was a depression or hole, and an accumulation of bark near it, in the highway, was proper where the only testimony on the subject was that of five witnesses for plaintiff and one for defendant who testified to the

fact as stated, and that of two witnesses for defendant who testified to an accumulation of bark but did not notice a hole.

3. Exceptions to the refusal to give instructions requested must be taken on the trial.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The plaintiff brings this action to recover damages for an injury claimed to have been sustained by him by reason of the defective condition of a certain highway in the defendant town. The trial of the action resulted in a verdict for plaintiff. The defendant appeals from the judgment entered thereon, alleging certain errors in the reception and exclusion of evidence and in the charge of the court.

For the appellant there was a brief by *T. B. Walsh* and *M. E. Dillon*, and oral argument by *Mr. Dillon.*

For the respondent there was a brief by *Cate, Sanborn, Lamoreux & Park*, and oral argument by *B. B. Park.*

BARDEEN, J. The only reasons urged why this judgment should not stand are that the court admitted improper testimony and erred in the charge to the jury. The only assignment of error as to the reception of evidence, worthy of special notice, arises upon this state of facts: A witness, John Flak, was allowed to testify, without objection, that he met with an accident at the place where plaintiff was injured, some little time before plaintiff's accident. He was then asked this question, "Did you tell anyone about it at Iron River?" The objection was made that it was incompetent, irrelevant, and immaterial, unless he talked about it to the town board. In ruling thereon the court used this language: "Well, the fact that he talked about it generally is a circumstance tending to show that the board might have found it out." The question was answered in the affirmative. The ruling of the court was palpable error, and would have required a reversal of this judgment, had it not devel-

oped, on cross-examination, that one of the persons with whom the witness talked was a Mr. Lund, one of the members of the town board. Lund was not sworn as a witness, and the fact that the town had notice of the defective condition of the highway does not seem to have been seriously controverted on the trial. True, the defendant denied the existence of an actionable defect in the highway, but whatever its condition was appears to have been known to the town authorities.

In the course of his charge, the court made use of the following language: "There is no question, under the evidence, but there was a depression or hole, and an accumulation of bark near it, in the highway." This statement was made while instructing the jury with reference to a question in the special verdict, as to whether the highway was maintained in a reasonably safe condition for travel. An examination of the testimony reveals the fact that the court was amply justified in the statement. Five witnesses for plaintiff and one for defendant testify to the existence of the hole or depression and of an accumulation of bark at the point in controversy. Two witnesses for defendant testify to the accumulation of bark at that place, but did not notice a hole. This is all the testimony on this subject, and it can hardly be said to raise an issue as to the existence of a hole or depression at the place of the accident. The court left it to the jury to determine whether the condition testified to rendered the highway unsafe and defective. Upon this issue the verdict was against the town, and cannot be questioned on this appeal.

Exceptions were taken to the refusal of the court to give certain instructions requested by the defendant, but the record shows that such exceptions were not taken on the trial, but were filed after the trial, when exceptions were filed to the charge. The exceptions were too late. It has long been the rule that exceptions to the refusal to charge must be

taken on the trial, and usually before the jury retires. *Firmeis v. State*, 61 Wis. 140; *Adams v. McKay*, 63 Wis. 404; *Stuckey v. Fritsche*, 77 Wis. 329; *Thrasher v. Postel*, 79 Wis. 503.

By the Court.—The judgment of the circuit court is affirmed.

PHILLIPS and another, Respondents, vs. HYLAND and others, Appellants.

January 31—February 21, 1899.

Execution sale of land: Inadequacy of price: Indexing.

1. Mere inadequacy of price paid at an execution sale of land will not justify the setting aside of the sale, especially as against *bona fide* purchasers from the purchaser at such sale.
2. Failure of the register of deeds to index a certificate of the sale of land on execution, as required by sec. 761, R. S. 1878, does not invalidate the sale.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Tomkins & Merrill*, and oral argument by *Geo. F. Merrill.*

A. R. Mead, for the respondents.

BARDEEN, J. This action is brought to quiet the title to certain lands claimed by the plaintiffs. The facts developed on the trial may be stated as follows: On August 25, 1890, one Leonard Seidelman became the owner of the land in question, securing title from the government. On May 5, 1892, one Veit Kohout docketed a judgment against Seidelman, in Douglas county, for the sum of $57.31. A transcript of said judgment was docketed in Bayfield county on May 10, 1892; an execution was issued; the land in ques-

tion was levied upon and sold thereunder to Kohout on July 11, 1892, for $89.56. A certificate of such sale was delivered to the purchaser, and a duplicate thereof filed in the office of the register of deeds of Bayfield county on July 22, 1892. The lands, remaining unredeemed, a deed was duly made to the purchaser on February 27, 1894, and recorded the same day. On December 10, 1894, Kohout and wife, by warranty deed, conveyed said land to plaintiffs, the consideration being $225. On May 16, 1893, Seidelman and wife conveyed said land to George Hyland, defendants' testator, who took title, without knowledge of the execution sale.

The defense tendered by the defendants was that the sale to plaintiffs' grantor was at a grossly inadequate price; that the certificate of sale upon which his deed was founded was never indexed, as required by sec. 761, R. S. 1878; that plaintiffs took their deed after the land had been purchased by Hyland, and were chargeable with notice of his interest in the land. The defendants offered to pay the amount of the judgment upon which the execution sale was made, with subsequent costs. The court's findings were in favor of plaintiffs, and the defendants seek to reverse the judgment entered pursuant thereto, on the ground, principally, that the plaintiffs' title is without equity. The argument is that the land was worth $600 at the time of the execution sale, and was bid off for about $90, and hence plaintiffs ought not to be permitted to enforce their title.

The only ground upon which this relief is sought is the alleged inadequacy of the price bid at the sale. No circumstance is alleged that impeaches the good faith of the sale. It was conducted in all things in accordance with legal requirements,— an open sale at auction, after due advertisement. There is no pretense that the judgment debtor was prevented or hindered in any way from protecting his interests. He allowed the year to elapse within which he might

have redeemed or have attacked the sale. The land having been conveyed to *bona fide* purchasers for value, considerations of equity which might have been raised in the original action cannot be urged against them. Mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale. *Schroeder v. Young*, 161 U. S. 334; *Parker v. Glenn*, 72 Ga. 637; *Central P. R. Co. v. Creed*, 70 Cal. 497. It is only in cases where there has been some irregularity in the sale, prejudicial to the owner, some collusion or undue advantage or unfairness, or some circumstance indicating fraud or the like, coupled with the alleged inadequacy of price, that courts of equity will intervene; and then never to the prejudice of innocent purchasers. There being nothing in the evidence to impugn the good faith of plaintiffs, their title, if otherwise good, cannot be attacked on the ground alone that their grantor bid an inadequate price at the sale under which he took title.

The referee found that the certificate of sale which was filed with the register of deeds had never been entered in any index in his office, as required by sec. 761, R. S. 1878. Counsel for defendants admitted on the argument that, in so far as his clients' rights were concerned in this litigation, it was not necessary to discuss whether the provisions of the statute were mandatory or directory, and that for the purposes of this action he would admit that they were directory. Sec. 3000 requires the officer making an execution sale to make out duplicate certificates of sale, one to be delivered to the purchaser, and the other to be filed in the office of the register of deeds. When this is done, the duty of the purchaser at the sale is complete. The statute (sec. 761) imposes the duty upon the register to make the proper index. The validity of the sale is in no way made dependent upon the proper indexing of the papers filed. A failure so to do might be an act of misprision for which the officer would be liable to a searcher of the records who might be misled to

his injury. Wade, Notice, § 165. The statute in relation to the filing and indexing of chattel mortgages is very similar. Under it this court held that its provisions were directory only, and that the failure of the officer to make the proper entries did not invalidate the mortgage. *Smith v. Waggoner*, 50 Wis. 155. The doctrine seems reasonable that the neglect of clerical duties should not be chargeable to the purchaser at the execution sale, who, in filing his certificate of sale, does so in obedience to the mandate of the law. Wade, Notice, § 170. If the statute made the indexing of the certificate constructive notice to subsequent purchasers of the land, a different question might arise. The existence of a judgment docket in the office of the clerk of the court would seem to be all that would be necessary to carry knowledge to the searcher of the records.

By the Court.—The judgment of the circuit court is affirmed.

SMALL, Respondent, vs. TOWN OF PRENTICE, Appellant.

102 256
f105 640

January 31—February 21, 1899.

(1) *Reference: Exceptions: Appeal.* (2–5) *Injury from defective sidewalk: Notice: Mailing: Evidence: Contributory negligence.*

1. Objections taken before a referee must be renewed before the court on the motion to confirm or to modify or set aside the report, and the rulings of the court thereon must be preserved in the bill of exceptions; otherwise the rulings of the referee cannot be reviewed by the supreme court on appeal.
2. Proof of the mailing of a written notice in time to reach the person addressed in the regular course of the mail, *prima facie* establishes the fact that it was so received.
3. The notice of injury from defects in a highway, required by sec. 1339, R. S. 1878, need not be personal notice. A notice mailed to and received by the proper officer is sufficient.
4. In an action for injuries sustained by falling on a sidewalk alleged to have been rendered uneven and unsafe by accumulations of ice

and snow, it was not sufficient for plaintiff to show such condition of the walk and that while proceeding with care he fell thereon and was hurt, but he should also show that the accident was the result of the defects alleged, especially where it appeared that the whole surface of the country was slippery and icy.

5. To run over a rough, uneven sidewalk which has been rendered slippery by ice and sleet, with knowledge of such conditions, constitutes contributory negligence.

APPEAL from a judgment of the circuit court for Price county: E. B. BUNDY, Judge. *Reversed.*

Action for injury on a defective sidewalk. The complaint alleged the defect as follows: "That said walk had become uneven from use, by the snow having sunk lower in some places than in others by incessant travel thereon, and the snow and ice had been allowed to accumulate on said walk, to become so rough and uneven, thereby making it dangerous and unsafe to travel thereon." The plaintiff fell and broke his leg while passing over this walk from the hotel to the depot, in the village of Prentice. The complaint further alleged the giving of notice, the filing of a claim, and the refusal of the town to act on the same. The answer admits the filing of a claim on March 25, 1893, but alleges that no notice as required by sec. 1339, R. S. 1878, was served on the town officials until May 11, 1893, after the town meeting had been held. The answer further alleged that the slipperiness of said walk was occasioned by the elements, for which defendant was not liable, and that plaintiff's accident was caused by his own want of care and prudence in passing over said walk.

By consent, the case was referred to a referee to hear, try, and determine. On the day appointed for the hearing, the referee not appearing, the testimony was taken by stipulation before a notary public. Sundry adjournments were taken by the notary for his own convenience. At the time the last adjournment was taken the plaintiff was on the stand, and had completed his direct testimony in rebuttal.

At the adjourned day he failed to appear. The testimony was finally submitted to the referee. At that time defendant moved to strike out plaintiff's testimony in rebuttal, because he had not appeared for cross-examination. The referee failed or refused to rule on said motion.

After holding the case under advisement for some time, the referee made findings for the plaintiff. Among other things, he found that plaintiff was injured as alleged in the complaint, without negligence or fault on his part; that the sidewalk, when he was injured, was unsafe for foot travel, "and that the same was rough, ridged, and uneven by use, and rounded up, and highest in the center, and sloping towards the outer edges of the walk, having an uneven, frozen, icy, and slippery surface," of which condition the town had due notice. He also found that notice of the accident was given to defendant's officers on March 25, 1893, and that the allegations of the answers were unproved. Plaintiff's damages were fixed at $1,500.

Exceptions were seasonably taken to the referee's findings. The report was submitted to the court, and confirmed, to which order defendant excepted, but the record fails to show that the defendant renewed the objections made before the referee when the case was submitted to the court. Judgment having been entered for the plaintiff, the defendant takes this appeal.

For the appellant there was a brief by *M. Barry*, attorney, and *Cate, Sanborn, Lamoreux & Park*, of counsel, and oral argument by *A. W. Sanborn* and *Mr. Barry*.

John B. Hagarty, for the respondent.

Bardeen, J. Many exceptions taken to the reception of evidence are assigned as error, and argued by counsel for defendant. They especially ask a ruling upon the failure or refusal of the referee to require the plaintiff to appear for cross-examination, or to strike out his testimony given

on rebuttal. The condition of the record renders us powerless to pass on these questions. It has long been the ruling of this court that objections taken before the referee must be renewed before the court on the motion to confirm or to modify or set aside the report, and the rulings of the court thereon preserved in the bill of exceptions. In no other way can the rulings of the referee be reviewed by this court. *Gilbank v. Stephenson*, 30 Wis. 155; *McDonnell v. Schricker*, 44 Wis. 327. When exceptions are duly taken to the referee's findings, as provided in sec. 2871, Stats. 1898, and are preserved in the bill of exceptions, this court will review the case, except that it will not consider errors committed by the referee in the course of the trial, unless preserved and presented in the manner before suggested.

The referee found that due notice of plaintiff's accident was given the chairman of defendant on March 25, 1893. This finding is based upon the fact that plaintiff's attorney, on March 24, 1893, sent a copy of such notice through the mail to Mr. Gallett, one of defendant's supervisors. The proof also shows that personal service was had of the notice on May 11, 1893, upon which Mr. Gallett admitted service. There is no proof that the copy of the notice sent by mail to Mr. Gallett was not received by him, except such as may be inferred from the following statement from his testimony. His attention was being directed to the notice upon which he had admitted service. He says: "I suppose that service was made on me at the time then stated. There was only one such service had on me of such notice." Counsel for defendant construe this to mean that the notice sent him by mail was never received. We cannot agree with this construction of the testimony. At no time had his attention been directed to the alleged service by mail. He was speaking only of the service admitted to have been made on May 11th, and then he says, "There was only one *such* service had on me of such notice." The use of the words "such

service" must be held to refer to the service concerning which he was being interrogated. There can be no question that a proper notice was sent through the mail in ample time for the witness to have received it on the date found by the court. Proof of the mailing of a letter in time to reach the person to whom it was addressed in the regular course of the mails, *prima facie* establishes the fact that it was so received. *McDermott v. Jackson*, 97 Wis. 64; Jones, Ev. § 46.

It is argued, however, that the service of such notice must be *personal*, and that nothing short of that will answer the purpose of the statute. The language of the statute is: "No such action shall be maintained against any . . . town . . . unless . . . notice in writing, signed by the party, his agent, or attorney, shall be given to . . . a supervisor of the town . . . against which damages are claimed." [R. S. 1878, sec. 1339.] No consideration of public policy of which we are aware requires that we should hold that such service should be personal. Undoubtedly, it must appear *prima facie* that such notice has been received by the proper officer, or no recovery can be had. Such facts appearing in this case, the finding of the referee cannot be disturbed.

Another question is raised as to the sufficiency of the evidence to support the finding that plaintiff's accident was the direct result of the defective conditions alleged. Admitting, for the purposes of the argument, that an actionable defect in the walk was shown, still we are convinced that there is no evidence in the record to support the conclusion that the accident occurred by reason thereof. The evidence is entirely silent as to how the accident occurred. The plaintiff says that he was very careful, picking his way along, and fell and broke his leg. Whether he slipped on a ridge or stepped in a depression he does not say. The evidence is that the whole surface of the country was slippery and icy. It had been raining and freezing, so that it was generally

slippery. With such attendant conditions, it was all the more necessary that plaintiff should show that his accident was the result of the defects of which he complained. This question has been so recently discussed and so fully covered by Mr. Justice MARSHALL in the case of *Hyer v. Janesville*, 101 Wis. 371, that nothing further need be said.

The finding upon plaintiff's negligence is clearly against the weight of the evidence. True, he says he was walking carefully, picking his way. He further says that he noticed the bad condition of the walk, and saw that it was rough, uneven, and in dangerous condition. Four witnesses for defendant say that he started for the depot on the run, and fell while running. If their testimony is to be believed,—and there is nothing suggested to impeach it,—the facts of plaintiff's negligence would seem to be pretty clearly established. Knowing, as he said he did, that the walk was rough and uneven, and that the ground was slippery with ice and sleet, to start on the run over this walk indicates a degree of indifference and carelessness bordering on recklessness. If the weight of the testimony is to be considered, the court's conclusions were certainly wrong.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment for the defendant.

MCNOLTY, Respondent, vs. BOARD OF SCHOOL DIRECTORS OF THE TOWN OF MORSE, Appellant. [102 261 f106 341 f106 477]

January 31—February 21, 1899.

Public schools: Employment of teacher: Contract.

Under sec. 528, R. S. 1878 (providing for an executive committee of town boards of school directors, to consist of the president, vice president, and secretary), and sec. 529, as amended by ch. 297, Laws

of 1887 (providing that such committee shall employ such teachers as they deem necessary; that each contract shall be in writing, shall be signed by the teacher and by the president and secretary, and when completed shall be filed in the office of the town board of school directors), a contract signed by said president and secretary individually, without authority duly given by the executive committee, is not binding on the district.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action against the school district by a school teacher to recover for five months' wages. The facts appearing upon the trial were that the plaintiff taught the defendant's school from September 1 to November 25, 1896, under a written contract, and was paid therefor. Just prior to the expiration of this term of service, the plaintiff claims that he had a talk with the secretary of the school board, and that the secretary promised that he should teach six months more if his teaching was satisfactory, and that after this talk the secretary made out a written contract for said six months, and that he saw said contract in the possession of the secretary, signed by the president and secretary, but that it was never delivered to him, and he never signed it. The president of the board denies signing any such contract, and the fact appears without dispute that the executive committee never considered the question as to the additional six months' service, and never ordered the making of any contract therefor. The plaintiff taught for one month after the expiration of his written contract, namely, up to the 21st of December, and was paid for that month, and a few days afterwards was discharged, and he brings this action to recover damages for the refusal to allow him to teach during the remaining five months. A motion for nonsuit was overruled, and a motion to direct a verdict for the defendant was denied, and exceptions duly taken to the rulings. A special verdict was rendered favorable to the plaintiff, which is not

necessary to be set forth in detail, and judgment rendered thereon for the plaintiff for $216.50, from which the defendant appeals.

For the appellant there was a brief by *Cate, Sanborn, Lamoreux & Park*, and oral argument by *B. B. Park*.

For the respondent there was a brief by *Tomkins & Merrill*, and oral argument by *Geo. F. Merrill*. They argued, *inter alia*, that if the contract was not properly executed, yet the board had ratified it by paying one month's salary and were estopped from denying it. *Athearn v. Ind. Dist.* 33 Iowa, 105; *Cook v. Ind. Sch. Dist.* 40 Iowa, 444.

WINSLOW, J. A verdict for the defendant in this case should have been directed, because there was no legal contract between the parties after the expiration of the first three months of service. This school was operated under the township system, and the employment of teachers was in the hands of the executive committee, composed of the president, vice-president, and secretary of the town board of school directors. R. S. 1878, sec. 528. The manner in which a teacher's contract must be made is contained in sec. 529, as amended by Laws of 1887, ch. 297, as follows: "The executive committee shall employ so many qualified teachers as they shall deem necessary to give instruction in all the schools under the charge of the board. Each contract shall be in writing; shall be signed by the teacher and by the president and secretary; shall specify the wages per week, month or year agreed upon by the parties, and when completed shall be filed in the office of the secretary of the town board of school directors, with a copy of the teacher's certificate attached thereto."

It is familiar law that when a board of public officers is about to perform an act requiring the exercise of discretion and judgment the members must all meet and confer together, or must all be properly notified of such meeting, in

order to make the action binding. Individual and independent action, even by a majority of the members of the board, will not suffice. *Martin v. Lemon*, 26 Conn. 192; *School Dist. v. Baier*, 98 Wis. 22. In the present case, even conceding that the president and secretary of the town board of school directors individually signed a contract for the teaching of the school by the plaintiff for another six months, still no binding contract was made, because the executive committee never authorized such a contract, and the action of two of the three members of the committee would not be sufficient. This consideration seems to dispose of the entire case. There was never a contract made, except the three-months contract. The powers of school-district officers are limited, and can only be exercised as the statute provides, and the plaintiff is legally charged with notice of the extent of such powers and the manner in which they must be exercised.

By the Court.— Judgment reversed, and action remanded for a new trial.

OLSON, Appellant, vs. DOHERTY LUMBER COMPANY, Respondent.

February 1—February 21, 1899.

Master and servant: Injury from defective appliances: Proximate cause: Assumption of risk.

1. While attempting to remove, with the aid of an iron hook, a blockade of timbers and slabs upon a roller bench in a sawmill, a slab sawyer was injured through the slipping of his hook from a timber, causing him to step back so as to come in contact with the slab saw. The blockade was caused by a short slab—too short to be carried over the rollers—upon which other timbers lodged. The employer had promised to put two additional live rollers in the bench, which would have moved the timbers further along the bench, but would not have prevented a blockade such as that in

question. *Held*, that the failure to furnish such additional rollers, not being the producing cause of the blockade, did not render the employer liable for the injuries.

2. The hook with which the plaintiff was attempting to remove the timbers being a simple contrivance, easily comprehended, as to all the dangers of its use, by any person of ordinary intelligence, and being entirely in plaintiff's care, he assumed the risk, if any, arising from the fact that its end was straight instead of curved and was not sharp.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action to recover for personal injuries. The allegations of the complaint cover facts which were established on the trial, or which there was evidence tending to prove, as follows:

Plaintiff was injured while in the employ of defendant as a slab sawyer in a sawmill. There was a roller bench fifty-six feet long, three and one-half feet wide, and three feet high, so located, for part of its length, by the side of the carriage track of a band saw used in manufacturing logs that the manufactured material would readily pass as fast as severed from the log to such bench and be conveyed away on rollers to points where it was taken from the bench according to its kind, the lumber being taken off nearest the saw, the edging going to near the end of the bench, and being there taken off on one side into what was called a "slasher," the slabs to about the same point where they were taken off on the other side onto a slab bench and cut into four-foot lengths, and square timber going to the end of the bench where it was taken off by a person located there, ordinarily, for that purpose. Seven live rollers were located crosswise of the roller bench about four feet apart, commencing at the end nearer the saw, and there were similar rollers, except they were not live, all the way to the outer end of the bench. The slab bench was at the side of the roller bench, and about half the length of it, commencing

at the outer end. Nearest the band saw the surface of the slab bench and roller bench about coincided, but the former inclined towards the slab saw, which was about six feet from the outer end of the bench, so that when the saw was reached the surface of the slab bench was about one foot lower than that of the roller bench. There were dead rollers in the surface of the slab bench, similar to those in the roller bench, so that slabs would pass easily down the incline towards the slab saw.

As stated, the slab saw was about six feet from the outer end of the slab bench. It operated at right angles with such bench, there being a slit crosswise of the surface, six or seven inches wide, back of which a movable saw frame was located and adjusted so as to be nearly or wholly back of the slab bench and under the roller bench when the saw was running idle, but could be moved forward wholly into the slit in the slab bench as necessary in sawing up slabs. There was an iron handle attached to the saw frame, extending about six inches above and over the slab bench when the saw was swung back under the roller bench. Though the saw was designed to go back entirely clear of the slab bench when running idle, there was evidence tending to show that, at times at least, it did not go wholly back. There was nothing about the location of the saw or its surroundings that made the work of the slab sawyer unusually dangerous when he was operating it. In such work, the sawyer stood by the side of the bench in a boxed depression in the surface of the floor so that his feet were several inches below such surface. When a slab was in place over the slit, the sawyer, by taking hold of the handle mentioned, would pull the saw forward till it engaged and cut the slab in two. Then, by slightly pushing back on the handle, the saw would recede to its place under the roller bench.

Plaintiff had an assistant and each was furnished with an iron tool about sixteen inches long with a hook end about

two inches long, pointed, and bent at about right angles with the handle. The hooks were used for pulling the slabs from the roller bench to the slab bench, and generally to facilitate moving slabs and other material that came down the roller bench. Sometimes short slabs were liable to get into such positions on the roller bench as to allow timbers to run upon them and cause a blockade, and in that situation plaintiff and his assistant were obliged to go upon the slab bench, pick out the slabs, and straighten the timbers, and push them along to the end of the roller bench. When timbers came down they would stop as soon as clear of the live rollers. In that situation it was necessary for plaintiff and his assistant, one or both of them, to go upon the slab bench and move the timbers along by using the hooks. Two additional live rollers would have lessened, or obviated entirely, the necessity for going upon the slab bench to do that kind of work under the circumstances mentioned.

About five days before the injury, plaintiff complained to defendant of the dangers attending his work because of the necessity of going upon the slab bench as indicated, and defendant promised to remedy the difficulty by obtaining a proper sprocket chain so as to operate two additional live rollers. Within a reasonable time after such promise was made, the injury occurred, and in this wise: A short slab was placed on the roller bench,— too short to go over the rolls. A timber lodged on the slab, a second timber came down and lodged on that timber, and a third, coming partly crosswise of the bench, lodged on the two other timbers, forming a complete blockade. There were slabs under both of the first timbers mentioned, and slabs behind the timbers. The first timber was down to within about four feet of the slab saw and about eight feet clear of the live rollers, it having been shoved to that point by timbers or material behind it. Plaintiff and his assistant went upon the slab bench to clear the blockade. Plaintiff struck his hook into one of

the timbers and pulled as hard as he could, stepping backward at the same time towards the slab saw. At the second step his hook let go of the timber, causing him quickly to take a third step, when his foot and limb went down into the slit in front of the slab saw, whereby, either by reason of the saw being partly out into the slit, or plaintiff's touching the saw handle and moving the saw toward him, it engaged his leg and seriously injured him.

Plaintiff appreciated fully the danger of doing the work in which he was engaged, but subjected himself thereto so far, as before indicated, relying upon the promise of defendant to add the two additional live rollers to the roller bench. There was evidence tending to show that if plaintiff's hook had been curved at the end instead of straight, and not been so blunt, it would have been less liable to slip. He had the entire care of the hook and it was his duty to keep it sharp, which he did, from time to time, by filing it.

At the close of the evidence the court, on motion of defendant's counsel, directed a verdict in defendant's favor. Judgment was rendered on the verdict, from which this appeal was taken, proper exceptions having been made to preserve for review the question whether the case should have been submitted to the jury.

For the appellant there was a brief by *Cate, Sanborn, Lamoreux & Park*, attorneys, and *Arctander & Arctander*, of counsel, and oral argument by *John W. Arctander*.

For the respondent there was a brief by *Lamoreux & Shea*, and oral argument by *W. F. Shea*.

MARSHALL, J. The only reason suggested by appellant why the court should have submitted this case to the jury, which seems seriously urged on the appeal, or worthy of consideration on the record, is that defendant was guilty of a breach of duty to plaintiff is not furnishing two additional live rollers in the roller bench, and while plaintiff was

relying on defendant's promise to remedy such breach of duty the injury occurred, and that such breach was the proximate cause of it. It is conceded that the bench was blockaded with timbers and slabs, and that plaintiff was engaged in obviating that difficulty when he received his injury. Now, unless the blockade, which was the immediate cause of plaintiff being placed in the position of danger, was caused by the failure of defendant to add the two additional live rollers to the roller bench, and was an event which defendant had reasonable ground to believe was liable to occur as a result of such failure, then, even though there was such failure, it cannot be said to have been the proximate cause of the injury complained of.

It follows necessarily that, unless there be evidence in the record from which a jury would have been warranted in saying that the want of two additional live rollers was the producing cause of the blockade, no other question need be considered, for that would fully justify the action of the trial court in taking the cause from the jury.

The evidence appears to show beyond reasonable controversy that a short slab,—too short to be carried over the rollers,—dropped down and lay in such a position that a timber ran upon it and stopped just after leaving the live rollers, and that other timbers and slabs came down and lodged on the first, so that the bench was completely blockaded thereby. Such being the facts, clearly the failure to have two additional live rollers had nothing whatever to do with the difficulty which caused plaintiff to place himself in the position of danger. It would have occurred just the same, though perhaps a little further down the table, if there had been two more live rollers. Plaintiff testified that the blockade was caused by a short slab being placed on the rollers, and that the head timber was pretty well down to the slab saw. He did not pretend to say where the short slab came from, but suggested that it might have been

placed on the rollers by some person who carried it over from the rotary saw. His language is: "The slab was pretty short, and sometimes they carried the slabs over from the rotary saw, and put them on the roller bed just when they let the timber come down from the carriage, and the timber would catch these short slabs and run upon them. I am certain the slab furthest down on the roller bench at the time I was hurt was a short one. I should think it was about four feet long. I don't know whether that short slab came from the rotary saw or the band." Again he said: "The piece of timber came down from the band saw and there was a slab in front of the first timber, and there was a slab behind the other timber." The witness illustrated by using some sticks and a model of the roller and slab bench, and said further, in substance: One of the timbers came down to within three feet of the slab saw and had a short piece of slab under the end of it so as to prevent its being moved forward without much manual exertion. According to the illustration made by the witness, the three timbers lay one over the other, the third being crosswise of the roller bed. He further testified: 'The effect of two additional live rollers would have been to have moved the timbers further along. The timbers would stop as soon as they left the live rollers, and sometimes a little before, without any obstruction in the way.' Plaintiff was corroborated by other witnesses. The testimony tended to show that two additional live rollers, under ordinary circumstances, would have moved timbers further down the roller bench, but would not have obviated the danger of a blockade being formed as the one in question was formed. The timbers were short and would have piled up and obstructed the bench, under the circumstances, regardless of whether there were two more live rollers or not. We find nothing in the evidence connecting the difficulty with the breach of duty complained of, in regard to want of additional live rollers.

In going back from the instant of the injury to the producing cause of it, the causal connection is lost, or rather stops at the blockade, if not at the circumstance of the hook slipping from the timber.

Some suggestion is made that the accident may be attributed to actionable negligence in respect to the character of the hook that was furnished plaintiff; that if it had been some longer, or the hook end had been curved instead of straight, and not been so blunt, the accident would not have occurred. The answer to that is that the hook was one of those simple contrivances, so easy of comprehension, as to all the dangers of its use, by any person of ordinary intelligence, even if it were defective in the respects suggested, that actionable negligence of the employer cannot be based on the fact of its being furnished to the employee for use in the performance of his work. In such circumstances, it is presumed that reasonable attention by the employee to those matters which are open, obvious, and easily comprehended by any ordinary person of mature years, will disclose to the employee all the dangers of using the defective contrivance, and he is therefore conclusively presumed to have assumed such dangers as a part of his contract of employment. *Borden v. Daisy R. M. Co.* 98 Wis. 407; *Holt v. C., M. & St. P. R. Co.* 94 Wis. 596.

It follows from what has been said that the verdict was properly directed in defendant's favor, and that the judgment entered thereon should be affirmed.

By the Court.—Judgment affirmed.

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107 120

CUNNINGHAM, Appellant, vs. EAGAN, Garnishee, Respondent.

February 1—February 21, 1899.

Debtor and creditor: Fraudulent conveyances: Garnishment.

The principal defendants owed their father about $2,100, and others about $6,000. To secure the debt to their father one of them gave him a mortgage on a stock of goods worth about $1,500, but remained in possession. The other transferred, by absolute bill of sale, and delivered to the father a stock of goods for an expressed consideration of $1,552, which was about their actual value, though their inventory price was about $2,000. This transfer was claimed by the son to be a payment *pro tanto*, but by the father to be as security only. Afterwards plaintiff obtained a judgment against the sons, and garnished the father. *Held*, that the transaction stated did not justify an inference of fraud which would render the father liable as garnishee in respect to the goods delivered to him.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Barney and Michael Eagan, indebted to their father, the respondent, in the sum of $2,100, and to others in about the sum of $6,000, had each a stock of goods. Michael Eagan executed a chattel mortgage to his father on his stock, worth about $1,500, to secure said sum of $2,100, the goods remaining in the mortgagor's possession. On the same day, or the following, Barney transferred to his father, by absolute bill of sale and delivery, his stock of goods, then removed to Ashland, for the expressed consideration of $1,552, which was seventy-five per cent. of their inventory price. He testified that the transfer was an absolute one in payment *pro tanto* upon said indebtedness. Shortly afterwards, the plaintiff, having obtained judgment against Barney and Michael Eagan, garnished the respondent, who answered, denying liability. The suit was tried in the circuit court for Ashland county with a jury. Barney testified substantially to the foregoing facts. The garnishee testified that the bill of sale from Barney was a security, and not in payment, and that, although the mort-

gage from Michael was executed the day before, they were both intended as the same transaction, namely, to secure the $2,100. At the close of the testimony, the court, on respondent's motion, granted a nonsuit, and judgment thereon, from which the plaintiff appeals.

For the appellant there was a brief by *J. J. Miles*, and oral argument by *Burr W. Jones*.

For the respondent there was a brief by *Tomkins & Merrill*, and oral argument by *Geo. F. Merrill*.

DODGE, J. The facts are without dispute, except as to whether Barney Eagan's transfer was absolute or as security. The fact of the indebtedness from Barney and Michael Eagan to their father in about the sum of $2,100 is clear. The only property of either which is shown to have actually come to the possession of the garnishee is Barney's stock, which, at inventory price, did not exceed $2,000, and was of actual value about $1,550. Its transfer to the father was accompanied by immediate possession; and whether, as testified by Barney, it was an absolute conveyance in payment *pro tanto*, or, as understood by the garnishee, was a delivery as security, there is nothing in the transaction to justify inference of fraud. It was less than the amount of the debt, so that no surplus could remain in his hands to be subject to garnishment. Michael's stock was not in the garnishee's possession, but was subject to levy by the plaintiff. Of course, as against such levy, the garnishee's mortgage could stand only for the balance of the $2,100 debt not paid by Barney's transfer,—$1,550 if absolute, or the proceeds of the stock if as security. There is, therefore, no evidence tending to prove either that the garnishee is indebted to, or has property in his possession or under his control belonging to, the principal defendants. *Carey v. Dyer*, 97 Wis. 554.

By the Court.—Judgment affirmed.

102 274
112 *192

NELSON, Appellant, vs. SHAW, Respondent.

February 1—February 21, 1899.

Master and servant: Personal injuries: Unsafe way: Promise to repair: Contributory negligence.

1. In an action for personal injuries, plaintiff's testimony tended to prove that he was employed by defendant to haul tan bark with a bob-sled over a private way of defendant, in which was a hole about eighteen inches deep, one and one-half feet wide, and three feet long, situated at the foot of a hill rising about eleven feet in a distance of 105 feet; that while plaintiff, sitting on a load of bark not confined on the rack nor bound on in any way, with the soles of his boots even with the front end of the load, and nothing for his feet to brace against, was descending such hill, the front bob was precipitated into the hole, and plaintiff thrown off the load and injured; that plaintiff knew of the defect in the road, had passed over it on preceding days from eleven to thirteen times, and, on the evening before the accident, had notified defendant's foreman of the defect and of his purpose to quit unless the defect was repaired; that thereupon the foreman had promised him that the defect should be repaired before he came out over the road the next morning; that plaintiff passed the place the next morning at 7 o'clock and noticed that the defect had not been repaired, but on his return with a load did not ascertain whether the defendant had redeemed his promise, but drove over the defective way and was injured. Defendant's witnesses denied the existence of the defect. *Held*, that it was error to direct a verdict for defendant.
2. If defendant expressly promised to repair the defect before plaintiff returned with his load, the plaintiff under the circumstances was not precluded by any rule of law from relying on such promise.
3. The testimony did not show that the defect was so imminently dangerous as to make it contributory negligence *as a matter of law* for the plaintiff to drive down the hill without first ascertaining whether the defendant had redeemed his promise to repair.
4. Whether plaintiff, in driving down the hill while sitting on the load as above stated, was guilty of such contributory negligence as would defeat his claim, was a question for the jury.

APPEAL from a judgment of the circuit court for Taylor county: JOHN K. PARISH, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Frawley, Bundy & Wilcox*, and oral argument by *R. P. Wilcox*.

For the respondent there was a brief by *Losey & Woodward*, and oral argument by *G. M. Woodward* and *B. B. Park*.

CASSODAY, C. J. This action was commenced September 4, 1897, to recover damages for personal injuries sustained January 25, 1895, by the plaintiff, while in the employ of the defendant as a teamster hauling tan bark from the lands described, for a distance of about eight miles, to the defendant's tannery at Rib Lake, by reason of an alleged defective private branch roadway provided and used by the defendant and his employees in hauling such bark. Issue being joined and trial had, the court, at the close of the testimony, directed a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff brings this appeal.

It appears and is undisputed that this branch roadway was built to get the bark to the main road, and was from one half to three fourths of a mile in length; that from the point where it connected with the main road it ran in a northeasterly direction, and was known as the "Mud Lake branch;" that the portion of the roadway in controversy extended from its junction with the main road northeasterly; that at a point some fifteen to thirty-five feet from its junction with the main road this bark roadway began to ascend a hill for a distance of about 105 feet; that the descent in that distance was a few inches less than eleven feet.

There is evidence tending to prove that at or near the foot of such descent there was a ditch and gully which existed in the traveled track, and extended at right angles to the traveled track; that the ditch and gully were partially concealed from the plaintiff by a log; that the front bob of the sleigh was precipitated into the ditch and gully with a quick, sharp jolt and plunge, and the plaintiff was violently thrown

off the load, and injured; that the plaintiff had had considerable experience working in the woods, building logging roads, hauling logs and bark; that he had put in logs and repaired roads for that purpose; that he began to haul bark for the defendant November 22, 1894, and, after working continuously in hauling on other roads, began to haul bark on this Mud Lake branch six or seven days prior to the injury; that during that time he had passed over this road from eleven to thirteen times,—the last time about 7 a. m. of the day on which the accident happened, and that time particularly observed its condition; that on the evening before the accident the plaintiff told defendant's foreman about the existence of the hole at the bottom of the hill, and that it was dangerous, and that he would quit work if the defendant did not fix the road; that the foreman then said he would have it fixed; that the plaintiff then asked him when he would do so, and he then promised that he would have it fixed before the plaintiff came out with another load the next morning; that on the morning in question several teams were driven on this road, loaded with bark; that the leading team — Knickerbocker's — was delayed at or near the intersection of the bark road with the main road by having its load, or part of it, fall off, which compelled the teams behind it to wait until it could be reloaded; that the plaintiff's team stopped for this reason just at the top of the hill described as being 105 feet long; that the plaintiff fastened his team at that place, and went across the lots to a shanty, to get a lunch, while waiting; that he remained there fifteen or twenty minutes, and returned the same way to his team; that he did not walk down the hill to the place where the men were reloading Knickerbocker's sleigh; that there was nothing on the side of the rack to hold it in place; that it was not bound on in any way; that the plaintiff sat on the middle of the load, with the soles of his boots even with the front end of the load, when the accident occurred.

The question recurs whether the court was justified in taking the case from the jury. There is testimony tending to prove that the hole was about eighteen inches deep and one and one-half feet one way and some three feet the other way; and in fact that there were two holes near each other. The defendant's testimony tends to prove that there was no hole in or alongside of the road; that the only depression in the surface of the road was a creek running directly across it, not far from the bottom of the hill, in which the water was at times fourteen inches deep, and that this creek was frozen solid at the time in question, and that the ice and snow made the road perfectly level at that place. Of course, on this appeal, we must assume the evidence most favorable to the plaintiff to be true and undisputed. *Kaples v. Orth*, 61 Wis. 531. Upon such assumption two questions present themselves for consideration. The first is whether the plaintiff, after having passed over the road so many times, and knowing all about the alleged defect, did not assume the risk. We are all clearly of the opinion that he did, up to the time when the defendant expressly promised to repair the defect the next morning and before the plaintiff would return with another load. Counsel contend that the plaintiff had no right to rely on such promise, but should have repaired the defect himself. This is put upon the theory that the repairing of the defect was not a matter of which the plaintiff had little or no knowledge, but a matter of ordinary labor, with which he was entirely familiar, like certain cases cited. *Corcoran v. Milwaukee G. L. Co.* 81 Wis. 191; *Showalter v. Fairbanks, M. & Co.* 88 Wis. 376; *Marsh v. Chickering*, 101 N. Y. 396. But we do not understand that the plaintiff's duty required him to repair the defect. If the defendant expressly promised to repair the defect before the plaintiff returned with his load, then we perceive no rule of law which precluded the plaintiff from relying on such promise. *Ferriss v. Berlin Machine Works*, 90 Wis. 541; *Patterson v. P. & C. R. Co.* 76 Pa. St. 389; *Wust v. Erie City Iron Works*, 149

Pa. St. 263; *Illinois S. Co. v. Mann*, 170 Ill. 200; *S. C.* 40 L. R. A. 781. Nor was the defect so imminently dangerous as to make it contributory negligence, as a matter of law, for the plaintiff to undertake to drive down the hill without first ascertaining whether the defendant had redeemed his promise to repair. *Burnell v. West Side R. Co.* 87 Wis. 387; *Schultz v. C. C. Thompson L. Co.* 91 Wis. 626; *Jensen v. Hudson S. Co.* 98 Wis. 73; *Curran v. A. H. Stange Co.* 98 Wis. 598.

The most serious question in the case is whether the plaintiff was not guilty of contributory negligence, as a matter of law, in driving down the hill while sitting on the load with the soles of his boots even with the front end of the load, and hence with nothing for his feet to brace against. But upon the whole evidence we are constrained to hold that the question of contributory negligence was for the jury. *Kenworthy v. Ironton*, 41 Wis. 647; *Simonds v. Baraboo*, 93 Wis. 40.

The appellant's brief is unnecessarily long, and does not comply with the rules, and hence only thirty-five pages of it should be taxed.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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102 278
107 244

WHITCOMB and another, Receivers, Appellants, vs. PROVOST, Respondent.

February 1—February 21, 1899.

Ejectment: Betterments: Homestead entry: "Color of title:" Adverse holding.

1. A holding under an invalid certificate of homestead entry is not a holding "by color of title" such as will support a recovery for improvements under sec. 3096, R. S. 1878.
2. One who has made a homestead entry of public lands but has not completed the purchase does not hold *adversely* to the United States or its grantee, within the meaning of sec. 3096, R. S. 1878.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action of ejectment to recover a quarter section of land which was in actual possession of the defendant, and upon which he had made improvements, and the sole question in issue was whether the defendant could recover the value of such improvements. The land in question was a portion of the lands granted to the state by the United States to aid in the construction of railroads, under the acts of June 3, 1856, and May 5, 1864, earned by the Wisconsin Central Railroad Company, and conveyed to that company by the state. The land was within the place limits of the grant, and was withdrawn from settlement June 12, 1856. On the 26th of June, 1887, the Secretary of the Interior revoked the order of withdrawal and formally restored the lands to the public domain, so that they were apparently open for homestead settlement. Public notice of this restoration was given, and on the 4th of November, 1891, the defendant, *Provost*, entered the land in dispute as a homestead, at the United States land office in the city of Ashland, and paid the fees of the register and receiver, and received the usual receipt of homestead entry, which recited the receipt of $18, being the amount of the fees and compensation of the register and receiver for the entry of the S. W. ¼ of section 17, township 45 N., range 4 W., under sec. 2290 of the Revised Statutes of the United States. The proper entries were made in the register of homestead entries kept in the local office, and upon the plats of government land in said land office, showing that the land had been entered by the defendant as a homestead. The defendant immediately took possession of the land, erected a dwelling house thereon, began clearing away the timber, moved his family thereon, and has ever since continued to reside there.

This action was commenced October 10, 1895. The defendant's answer admits the plaintiffs' title, and counter-

claims for the value of his improvements since his entry, under sec. 3096, R. S. 1878. The facts were all stipulated, and the value of the improvements was stipulated to be $900. Motions to direct a verdict were made upon both sides, and the court directed a verdict in favor of the plaintiffs for the possession of the land, and in favor of the defendant for the value of the improvements. Judgment was entered upon this verdict, and from so much of the judgment as permits the defendant to recover for improvements the plaintiffs appeal.

For the appellants there was a brief by *Howard Morris*, attorney, and *Thos. H. Gill*, of counsel, and oral argument by *Mr. Gill.*

Willis V. Silverthorn, for the respondent, contended that sec. 3096, R. S. 1878, is remedial and should be liberally construed. *Eckhard v. Donohue*, 9 Daly, 214; *Hudler v. Golden*, 36 N. Y. 447; *Weed v. Tucker*, 19 N. Y. 422; Sutherland, Stat. & Const. Law, § 437. The intention of the statute in such case will prevail over its literal terms. Wilb. Stat. Law, 235; *Avery v. Groton*, 36 Conn. 304; *Fox v. Sloo*, 10 La. Ann. 11; *Smith v. Stevens*, 82 Ill. 554; *Vigo's Case*, 21 Wall. 648; *State v. Powers*, 36 Conn. 77; *Houk v. Barthold*, 73 Ind. 21; Sutherland, Stat. & Const. Law, § 409; *Pacquette v. Pickness*, 19 Wis. 219. The statute was intended to apply to all cases where improvements had been honestly made by the party in possession under a supposed title or one that might ripen into a title. R. S. 1849, ch. 107; sec. 2, ch. 84, Laws of 1857; secs. 30–34, ch. 141, R. S. 1858; ch. 273, Laws of 1861; sec. 3096, R. S. 1878; and ch. 282, Laws of 1893. Under a homestead entry the records of the government land office, together with the receiver's receipt, constitute a written instrument under said section. *Whittaker v. Pendola*, 78 Cal. 296; *Cawley v. Johnson*, 21 Fed. Rep. 495. A homestead entry conveys an immediate, valid, subsisting title and interest in the lands so entered. *White v. H. & D. R.*

Co. 2 Copp, Pub. Land Laws (1882), 878; *Wilcox v. Jackson*, 13 Pet. 516; *Witherspoon v. Duncan*, 4 Wall. 218; *Burlington, K. & S. W. R. Co. v. Johnson*, 38 Kan. 142; *U. S. v. Turner*, 54 Fed. Rep. 225; *U. S. v. Ball*, 31 Fed. Rep. 667; *U. S. v. Freyberg*, 32 Fed. Rep. 195; *Culbertson I. & W. P. Co. v. Olander*, 51 Neb. 539; *Red River & L. W. R. Co. v. Sture*, 32 Minn. 95; *Pairier v. Comm'rs of Itasca Co.* 68 Minn. 297; *Nelson v. Big Blackfoot M. Co.* 17 Mont. 553; *Northern R. Co. v. Gould*, 21 Cal. 254; *Lytle v. Arkansas*, 9 How. 334. And such entry segregates the lands from the public domain, and holding under such entry is "*color of title.*" *Culbertson I. & W. P. Co. v. Olander*, 51 Neb. 539; 1 Copp, Pub. Land Laws (1882), 387, 388; 1 Land Dec. Dept. Int. 58–60; *White v. H. & D. R. Co.* 2 Copp, Pub. Land Laws (1882), 878; *Wilcox v. Jackson*, 13 Pet. 516; *Edgerton v. Bird*, 6 Wis. 527; *McMillan v. Wehle*, 55 Wis. 685; *Wright v. Mattison*, 18 How. 50; *Woodward v. Blanchard*, 16 Ill. 430; *Bogardus v. Trinity Church*, 4 Paige, 200; *Clapp v. Bromagham*, 9 Cow. 556; *Jackson v. Todd*, 2 Caines, 183; *Jackson v. Harder*, 4 Johns. 208.

WINSLOW, J. The defendant admitted that, under the decision of the supreme court of the United States in *Wis. Cent. R. Co. v. Forsythe*, 159 U. S. 46, the plaintiffs had the title to the land in question, and must recover because the same was within the place limits of the grant to the Wisconsin Central Railroad, and hence not open to homestead entry in 1891. The defendant claimed to recover for his improvements, however, under sec. 3096, R. S. 1878, and the only question in this case is whether such a recovery can be sustained. That section provides as follows: "In every case where a recovery shall be had of any land, on which the party in possession, or those under whom he claims, while holding adversely by color of title asserted in good faith, founded on descent or any written instrument, shall have

made permanent and valuable improvements, or shall have paid taxes assessed, such party, for himself and for the benefit of those under whom he claims, shall be entitled to have from the plaintiff, his heirs or assigns, if he insist upon his recovery, the value of such improvements at the time the verdict or decision against him is given, and the amount paid for taxes, with interest from the date of the payment, to be assessed and recovered as hereinafter provided, and for the payment thereof shall have a lien on the real estate so recovered."

It is apparent that the defendant, in order to recover for his improvements in the present case, must show the concurrence of four conditions, namely: (1) Adverse holding, (2) by color of title, (3) asserted in good faith, and (4) founded on some written instrument. Failure in any one of these conditions will defeat his claim. It seems evident that these conditions are not all present in this case. "Color of title" has been generally defined as "that which in appearance is title, but which in reality is no title." *Wright v. Mattison*, 18 How. 50; *Edgerton v. Bird*, 6 Wis. 527. Now, unless a holding under a valid certificate of homestead entry is in fact a holding under title, a holding under an invalid certificate of homestead entry cannot be a holding under "color of title." If a valid certificate is not title, an invalid certificate cannot be appearance of title.

The supreme court of the United States has recently held, after full consideration, that land entered as a homestead continues to be the property of the United States for five years following the entry, and until a patent is issued, and that the homesteader has no right to cut standing timber to sell, or any timber save such as is necessary to clear the land for cultivation and build necessary buildings and fences, and may be criminally prosecuted if he cuts beyond such limitations. *Shiver v. U. S.* 159 U. S. 491; *Stone v. U. S.* 167 U. S. 178; *Flint & P. M. R. Co. v. Gordon*, 41 Mich.

420. This principle seems to determine conclusively the question here. A man who makes a valid homestead entry has not the title to the land, and hence the man who makes an invalid homestead entry has not even the appearance of title.

True, the homesteader may have rights as against third persons which he may enforce. *Culbertson I. & W. P. Co. v. Olander*, 51 Neb. 539; *Pairier v. Comm'rs of Itasca Co.* 68 Minn. 297; *Red River & L. W. Co. v. Sture*, 32 Minn. 95. Such rights are sometimes given to him by state laws. *Whittaker v. Pendola*, 78 Cal. 296. He may also have a right to carry out the conditions of his entry, and earn his patent. But the question here is not whether he has rights in the land of some nature, or whether they may not be vested rights, but whether he has title. As said in *Vilas v. Prince*, 88 Fed. Rep. 682: "The homesteader has a right to earn the land by residing upon and improving it, and that is the extent of his right. . . . It is always understood that such an entry is subject to be canceled by the land department in case the land is not subject to entry, as in this case."

There is no analogy between a certificate of homestead entry and a receiver's certificate of purchase of public lands. This last is made evidence of title by our statutes (R. S. 1878, sec. 4165), and is held to convey all the substantial interest of the government in the land. *Cawley v. Johnson*, 21 Fed. Rep. 492. The consideration has been fully paid, and nothing remains to be done except to execute the patent. In a case of homestead entry, however, nothing has been paid for the land, and the homesteader simply has acquired a right to earn or buy it in the future. At most, the receipt amounts to nothing more than an executory contract to convey the land upon the performance of certain conditions. One who holds under an executory contract for the purchase of lands does not hold *adversely*, as against his vendor or

his vendor's grantee, until after full performance of the conditions of his contract. *Simpson v. Sneclode*, 83 Wis. 201. So, in this respect also, the defendant fails to meet the requirements of the statute.

The case seems to be a hard one, but, in any view which we have been able to take of it, we have been unable to see how the defendant can recover under the betterments statute. By the stipulation of facts, it appears that the defendant knew before his entry that the lands which he entered were part of the "Omaha land grant." It seems very probable that he should have anticipated that his claim to the land was liable to be disputed.

By the Court.—That part of the judgment which is appealed from is reversed, and the action is remanded with directions to dismiss the defendant's counterclaim.

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102 284
108 375
108 376
108 520

KENNEDY, Respondent, vs. SOUTH SHORE LUMBER COMPANY, imp., Appellant.

February 1—February 21, 1899.

Sale of logs: Joint employment of scaler: Right of one party to discharge: Damages: Liens.

1. A contract for the sale of logs provided that they should be scaled by a scaler mutually agreed upon or, in default of such agreement, a scaler appointed by a certain third person, and that if the scale of any person selected under the contract to make such scale should prove unsatisfactory to either party, then such party should have the right to insist upon a change of scalers, and a new scaler should be appointed. Pursuant to the contract plaintiff was appointed as scaler by such third person and acted as such until the vendee, being dissatisfied, notified him to discontinue work. The vendors, however, declined to consent to a change, and under their direction plaintiff held himself in readiness for several months to scale the logs, but the vendee did not permit any logs to be scaled during

that time. *Held*, that plaintiff's right of action, if any, was not for wages earned, but for damages for breach of the contract of employment, and that the damages should be limited to the value of the time it would ordinarily have taken to scale the logs in the general course of business.

2. Under such contract of sale the vendee had the right to discharge plaintiff without the vendors' consent, either party having the right to insist upon a change of scalers when dissatisfied with one previously appointed, whether he was appointed by mutual agreement or by the third person mentioned.

3. A claim for damages for breach of a contract of employment is not a lienable claim under sec. 3329, R. S. 1878.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Action in form to recover on a contract of employment to scale logs, and to secure a lien judgment, based on the following facts which were established by evidence on the trial:

John McAlpine, A. B. McDonell, and Thomas Irvine as parties of the first part, and the *South Shore Lumber Company* as party of the second part, all joined as defendants here, made a written contract by which the latter purchased of the former a quantity of saw logs, agreeing to pay a price therefor named in such contract, according to the measurement thereof to be made on the log deck of the purchaser's sawmill by a scaler mutually agreed upon, or, in default of such agreement, a scaler appointed by one Cochran. In respect to changing scalers in case of either party being dissatisfied with one previously appointed, the contract provided as follows: "If the scale of any person selected under this contract to make said scale shall prove unsatisfactory to either party, then such party shall have the right to insist upon a change of scalers, and a new scaler shall be appointed." The language in regard to the selection of a scaler by the mutual agent, Cochran, was as follows: "And in case of a failure of the parties hereto to agree upon such scaler,

then the scaler shall be designated by Judge Cochran of Ashland."

The latter clause of the contract became operative, resulting in the appointment of plaintiff by Cochran. Pursuant thereto, between the 12th day of June, 1896, and the 7th day of July thereafter, plaintiff actually worked, as defendant conceded on the trial, about eleven days. Plaintiff conceded payment in full for eight and one-half days' work, one half by each party, and also payment for one-half time by the first parties to the log sale contract, for the time till he consented to terminate his relations with the parties, October 4, 1896. July 7, 1896, the *South Shore Lumber Company* being dissatisfied with the plaintiff as scaler, declined to allow him to continue work, and duly notified him in writing to that effect. The situation as stated was brought home to the first parties. They declined to consent to changing scalers, and directed plaintiff to continue work and to hold himself in readiness to scale the logs whenever there were logs to be scaled. The result was that the *South Shore Lumber Company*, insisting upon their right to a change of scalers, did not saw any logs or permit any to be scaled under the contract, till after October 4, 1896. Plaintiff held himself in readiness to scale the logs during all such time. After October 4, 1896, the parties made provision for scaling the logs, and the work was completed during the fall, the amount, as it appears, being some less than 1,500,000 feet.

This action was brought in form to recover for ninety-seven days' work from the 12th day of June, 1896, to October 4, 1896, at $120 per month, less the amount theretofore paid plaintiff. The amount claimed to be due was $204 and interest from October 6, 1896. On the trial plaintiff testified that the $204 was for time between July 14 and October 4, 1896; that he did not perform any work during that period. Facts were established requisite to a lien judgment for work performed. At the close of the evidence defendant's counsel

conceded the evidence warranted a finding of $11.52 as due plaintiff for work on the logs, and on the theory that one of the joint employers alone could terminate their relations with the scaler if dissatisfied with him, moved the court to direct a verdict in plaintiff's favor for $11.52, and that it was a lienable claim on the lumber as prayed for in the complaint. The motion was overruled, the court holding that neither of the joint employers could discharge plaintiff without consent of the other, hence that he was entitled to full wages, at $120 per month, up to October 4, 1896, less what had been paid him. The court submitted the case to the jury, but in effect, by the charge, directed a verdict for plaintiff for $204 and interest, making in all $216.92, and that it was a lienable claim. Judgment was rendered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Tomkins & Merrill*, and oral argument by *Geo. F. Merrill.*

For the respondent there was a brief by *Lamoreux & Shea*, and oral argument by *W. F. Shea.*

MARSHALL, J. Assuming the view of the learned trial court to be right, that plaintiff, under the terms of the log sale contract, became the employee of the parties thereto the same in all respects as if they had personally jointly employed him instead of his having been designated as scaler by the mutual agent, Cochran, and that neither of the joint employers, without consent of the other, could terminate the contract of employment,—and such is obviously true if the familiar principle applies that consent of parties to a contract is as essential to terminate it as to make it,—still that does not militate against the power of any party to a contract once made, to commit a breach of it and make himself liable in damages therefor, to be assessed according to familiar rules governing such a situation. If, according to the court's construction of the contract, it was not termi-

nated by the conduct of the *South Shore Lumber Company*, it was breached by such conduct. Thereafter plaintiff did not perform any work under the contract. He was not permitted to do so. His cause of action, if he had one, was not for wages earned for work done, but for damages for loss of opportunity to labor and earn wages. In assessing such damages, the limit was such damages as could reasonably have been considered to have been in contemplation by the parties, at the time of making the contract, as the probable result of the breach of it. No principle of law applicable to contracts is better settled than that. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214; *Bradley v. C., M. & St. P. R. Co.* 94 Wis. 44. Applying that principle to the facts of this case, it is readily seen that the damages reasonably in contemplation of the parties at the making of the contract in the situation indicated, did not exceed the time it would ordinarily have taken to have scaled the logs in the general course of business. The idea that it included several months' time, waiting around, watching for an opportunity to do work that plaintiff was notified he would not be permitted to do, is quite novel, and cannot be sustained as good law. The learned court misconceived the rights of plaintiff under the circumstances, even upon the construction of the contract that was supposed to rule the case, in holding that plaintiff was entitled to wages for work under a contract instead of damages for not being permitted to work. That grew out of failing to distinguish between terminating a contract and committing a breach of it. The *South Shore Lumber Company* could not terminate the contract of hiring without the consent of the joint employer, if the principle applies to the situation stated before in this opinion, but either joint party could commit a breach of it, rendering both such parties liable in damages to plaintiff; and upon settlement between such joint employers, the one at fault would be chargeable with the loss.

It follows from what has been said that the judgment must be reversed in any event, as it clearly appears that the time it would probably have taken plaintiff to have done the work he was prevented from doing does not exceed twenty or thirty days. Further, plaintiff was not entitled to a lien judgment except for the time he worked on the logs. Lienable claims under the statute do not include damages for breach of contract, but wages earned under contract of the kind of work mentioned in the statute. The same rule applies to lienable claims on logs and lumber under sec. 3329, R. S. 1878, as on buildings under secs. 3314, 3315. *Siebrecht v. Hogan*, 99 Wis. 437.

It is further considered that the judgment must be reversed for misconstruction of the log sale contract on the subject of whether one of the joint employers possessed authority to discharge plaintiff without consent of the other. The learned trial court held that the express language of the contract, giving to each party the right to insist on a change of scalers, referred only to the scaler mutually agreed upon, and not to the one designated by Cochran. The idea in the judicial mind seems to have been that however unsatisfactory to a party the scaler appointed by one method might be, such party was powerless to obtain any relief, while in case of a scaler appointed by another method such party could insist upon his discharge at any time in the event of his being unsatisfactory. That construction is too unreasonable to be adopted if the language of the contract will reasonably admit of another that does not involve the infirmity suggested. It is considered that it does admit of such other construction, or, to state it more accurately, that the plain, unmistakable meaning of the language used by the parties is that each party was given authority to insist upon a change of scalers when dissatisfied with one previously appointed, and without regard to the method of ap-

pointment. The language in that regard is general, as follows: "If the scale of *any person selected* under this contract to make said scale shall prove unsatisfactory to either party, then such party shall have the right to insist upon a change of scalers, and a new scaler shall be appointed." The language, considered by itself, or with its context, does not reasonably admit of an exception. If the parties intended to deprive themselves of the power to severally insist upon the discharge of a scaler designated by Cochran, and retain such power in case of one mutually agreed upon, it was very easy to have said so; but they did not so say. On the contrary they reserved, without exception, the power to severally insist upon a change of scalers, and when plaintiff accepted the appointment by Cochran he became a party to that arrangement. Hence when the *South Shore Lumber Company* notified him that his services were no longer wanted because as a scaler he was not satisfactory to such company, the contract of employment was, by its plain terms, terminated.

There are other matters which appear by the record proper for mention, though not necessarily in the case. It does not appear that any rate of wages was expressly agreed upon with plaintiff. For aught that appears, his compensation for the time he actually worked was limited to the reasonable value of his services according to the going wages for that kind of work. Cochran had no authority whatever to do more than merely to designate the scaler. That act brought plaintiff into contract relations with the parties to the log sale contract and entitled him to going wages for work performed while it continued, and damages for the breach of it on the same basis, unless diminished by wages he had, or reasonably might have, earned elsewhere. Of course, if Cochran agreed with plaintiff as to the amount of his wages, and that was consented to by the joint employers,

it was binding upon them; but he had no authority to do that by anything contained in the written contract. It is quite probable that on the evidence alone plaintiff was not entitled to a verdict at all, for he testified that the time he claimed wages for was between July 14th and October 4th, during which time he did not perform any labor, and before which he was rightfully discharged. But the complaint covers from June 12th to July 14th, and defendant's counsel admitted $11.52 due plaintiff for work performed during such time, and moved the court to direct a verdict accordingly. The denial of such motion under the circumstances was error, but this being a jury case, and there being no verdict upon which a judgment can be rendered, there must be a new trial in accordance with the uniform practice in such circumstances.

By the Court.— The judgment appealed from is reversed, and the cause remanded for a new trial.

McHUGH, Respondent, vs. TOWN OF MINOCQUA, Appellant.

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February 1—February 21, 1899.

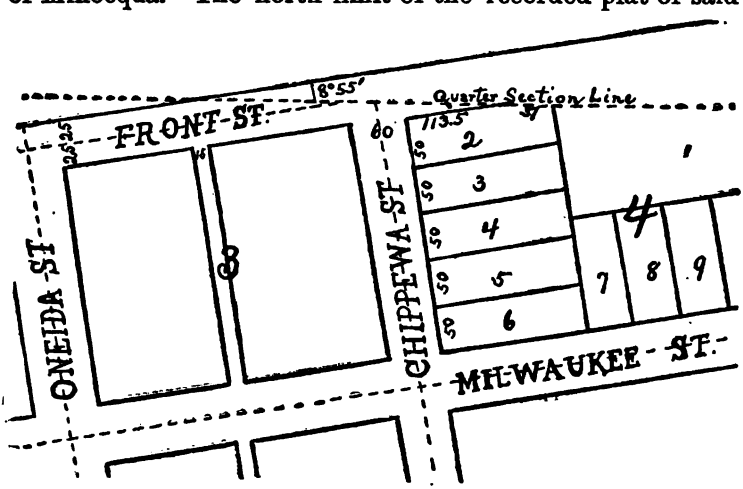
Plats of land: Dedication of streets: Acceptance: Injury from defective sidewalk built by private individual: Notice of defects: Contributory negligence.

1. On the recorded plat of an unincorporated village, at the easterly end of a street running a little north of east, a triangular piece of ground was left uninclosed, within the limits of the plat but adjoining a quarter-section line which was its northern boundary. All parallel streets were left open at their easterly ends, indicating an intention to have them connect with the streets of additions to be made on that side; and for that purpose the triangle in question would be necessary. *Held*, that the triangle was dedicated as part of the street.

2. A resolution of the town board ordering such street to be opened up for traffic to its easterly end, followed by working of portions thereof, constituted an acceptance by the town of that street, including the triangle.
3. The presence, in a public street, of a sidewalk largely traveled by the public for some months before an accident thereon, rendered the town responsible for its defects, although it was originally constructed by a private individual and for private use.
4. Knowledge on the part of the proper authorities of the generally defective and rotten condition of a sidewalk does not charge them with notice of a specific defect alleged to have caused an injury, where such specific defect was of a different kind and in no way connected with the generally defective condition.
5. If, in this case, the defect causing plaintiff's injury was a part of or included in the generally defective condition of the sidewalk, it was a question for the jury whether, in view of his familiarity with such condition, he was not guilty of contributory negligence in failing to exercise greater precaution against injury thereby.

APPEAL from a judgment of the circuit court for Vilas county: CHAS. V. BARDEEN, Circuit Judge. *Reversed.*

The plaintiff was injured on April 19, 1895, upon a certain board walk within the limits of the unincorporated village of Minocqua. The north limit of the recorded plat of said



village was a quarter-section line, which ran at an angle of 8° 55′ with the east and west street and block lines. Along the northerly side of said plat was Front street, running east and west. One of the north and south streets was Chippewa street. The point of intersection of the center lines of Chippewa street and Front street would have been almost upon this quarter-section line,— distant perhaps two or three feet to the north and outside of it. The quarter-section line intersected the line of the north lot on the east side of Chippewa street (lot 2, block 4) at a point about 113 feet east of the east line of said street, thus leaving a triangle to the north of that lot, about twenty-five feet base on the extended east line of Chippewa street, and running back to a point about 113 feet east of it. The center line of Front street, which is shown upon said plat in accordance with law, does not extend eastward beyond the intersection of the center line of Chippewa street, and it appeared that there was no use, other than by this walk, made of the vacant ground north of said lot 2 for the purposes of a street. In 1890 the town board resolved that Front street be opened up to traffic from Oneida street, running east, to the end of the street. No work was ever done east of Chippewa street. On said lot 2, and flush with the north line thereof, was an hotel, about seventy feet deep, known as the Briggs House. Along the north line of that hotel was built by its proprietor, about four years before the accident, the board walk in question, for the purpose of access to the rear of said hotel and the stables and conveniences there situated. The land north of the quarter-section line was unoccupied government land. In the year 1894 a saloon was built some distance to the eastward and on this unoccupied government land, which was much resorted to, and the proprietor of that saloon built a board walk therefrom to connect with the walk in question. The place of injury was by the side of the hotel, and between thirty-five and sixty-three feet east of the east line of Chip-

pewa street. The walk at that place had originally been built of inch boards, and for a long time had been generally rotten and in bad condition, to the knowledge of the town authorities.

The plaintiff on the occasion in question, at 9 o'clock in the evening of a moonless night, passed down said sidewalk, with which he had been familiar for a long time, on his way to said saloon, giving no thought to the condition of the walk. Near the rear end of the hotel he stepped into a hole occasioned by the breaking out of an eight-inch board a space about ten inches long, which hole was unknown to him and had been there only a day or two, and received substantial injury, for which he brought suit. The court substantially directed a verdict for plaintiff, submitting only the question of damages. Judgment for plaintiff, from which defendant appeals.

For the appellant there was a brief by *D. E. Riordan*, attorney, and *John Barnes*, of counsel, and oral argument by *Mr. Barnes*.

A. W. Shelton, for the respondent.

DODGE, J. The errors assigned are: First, that the court erred in taking from the jury the question of the plaintiff's contributory negligence; second, the court erred in holding, as a matter of law, that the defendant town had notice of the defect which caused the injury; third, the court erred in holding, as a matter of law, that the accident occurred within the limits of a highway.

1. Logically, the third assignment should be considered first, as its decision in accordance with the contention of the defendant would be final of the case. A careful examination of the plat convinces us that the triangle left uninclosed on the north side of lot 2 in block 4 is thereby dedicated as a part of Front street. The extension of the north line of that street for some 200 feet beyond this point, the

noninclosure of the end of the street, and the fact that all of the other east and west streets are left open on the east, all indicate expectation on the part of the platter that additions were likely to be made on that side, and that streets in such additions would connect with the streets on this plat. For that purpose the triangle in question would be necessary. Being so dedicated, we think the fair construction of the resolution of the town board ordering Front street, amongst others, to be "opened up for traffic" for its full extent, followed by working of portions thereof, constitutes an acceptance by the town of that street, inclusive of this triangle. The very slightest application of geometrical or trigonometrical computation to the known angles and distances establishes that at the point of the injury, from thirty-five to sixty-three feet east of Chippewa street, the northerly line of this triangle was more than eight feet distant from the north line of the lot, so that the entire sidewalk was within the triangle, and therefore within the street. If the *locus in quo* was a public street, the presence there of a walk, which was largely traveled by the public for some months before the accident, imposes upon the town the usual responsibility for its defects, notwithstanding it was originally constructed by a private individual and for private use. *Luck v. Ripon*, 52 Wis. 196, 199. The circuit court was right in holding the place of the accident to be within the street.

2. The first and second assignments of error mingle with each other, and may well be considered together. There is evidence establishing a generally defective and rotten condition of the sidewalk, of which condition the town officers had knowledge. There is also evidence that the specific defect which caused the injury was the breaking out of a portion of a single board. The evidence, however, is not at all conclusive as to whether this specific defect was in any way connected with the generally defective condition. While it

is undoubtedly the law that if the defect causing the injury is a part of, or included in, the generally defective condition of a walk, such specific defect need not be brought to the notice of the town, yet it is also true that there may be specific defects, causing injury, not so connected with the general condition that the town would be chargeable with notice thereof from its general knowledge. *Sullivan v. Oshkosh*, 55 Wis. 511; *Spearbracker v. Larrabee*, 64 Wis. 573; *Shaw v. Sun Prairie*, 74 Wis. 105; *Bergevin v. Chippewa Falls*, 82 Wis. 505.

In substantially all of these cases the defective condition consisted in rottenness and resulting looseness of boards, and the specific defect was that a single board became loose because of rottenness,—exactly in line with the general condition known to the public officers, and which would have been prevented had the general condition been properly treated. In *Bergevin v. Chippewa Falls*, on the other hand, the sidewalk was known to be defective in the vicinity of the injury, but the known defects differed in kind from the specific defect causing the injury. The court held that knowledge of the one kind of defects did not charge the defendant with notice, in law, of the others.

In the case at bar we only know that a part of a board was broken out,— whether by reason of rottenness or other fault of the kind characterizing the walk in general, or by accident or design, not inconsistent with its entire soundness and sufficiency, we are not informed. Indeed, so far as appears by the evidence, this specific defect might have existed at the time of the accident if the town officers had two days before gone over the entire walk with due care and replaced every rotten piece with a sound one. If this defect were of the latter sort, it having existed for only a day or two, no presumption in law of notice to the board would result. It therefore should have been submitted to the jury to say whether the defect causing the injury was a

part of, or due to, the generally defective condition of the walk. If it was not, the question should have been submitted to the jury whether the town officers had notice, either actual or constructive, of its existence.

If, however, the specific defect causing the injury was so included within the generally defective and rotten condition of the walk that it could be said that the undisputed evidence established notice thereof to the town officers, we are of opinion that the question of the plaintiff's contributory negligence should have been submitted to the jury. He is shown to have been a marshal or policeman until within a few days before the accident, and for six months prior thereto. His duties during all of that period had required frequent travel over this walk. He had noticed holes therein, and he was entirely familiar therewith. The general condition shown to exist was such as could not have escaped the notice of one so familiar with it, and, if that general condition was such as to justify the expectation of the specific defect in question, he was chargeable, as well as the town, with the duty of anticipating its possible existence; and ordinary care on his part would require him to exercise precaution against being injured thereby. *Grimm v. Washburn*, 100 Wis. 229. His own testimony shows conduct at least justifying two opinions as to whether it was consistent with ordinary care. He testifies that, if his mind had been on the subject, he could have seen such a hole by looking out for it, but that he never gave it a thought, though nothing occurred to divert his attention. It appears to us, therefore, that upon the only theory upon which it could be said, as matter of law, that the town had notice of the defect, the plaintiff's conduct was such that the question of his contributory negligence should have been submitted to the jury.

By the Court.—Judgment reversed, and cause remanded for a new trial.

BARDEEN, J., took no part.

STADLER, Appellant, vs. SMITH and another, Respondents.

February 2 — February 21, 1899.

Garnishment: Money deposited on wager: Evidence.

In garnishment proceedings, evidence that as to money deposited by the defendant with the garnishee the latter was stakeholder on a wager, and that the defendant had no beneficial interest therein but had acted as agent for another in making the deposit, was admissible as against the objection that the garnishee could not prove an illegal transaction as a foundation for a defense.

APPEAL from a judgment of the circuit court for Marathon county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed.*

This action involves less than $100, and comes here upon certificate of the circuit judge. The facts certified are in substance as follows: *Stadler* had a valid judgment against *Smith* for $72.50, and issued execution thereon, and commenced garnishee proceedings under sec. 2753, R. S. 1878. Both *Smith* and the garnishee defendant, *Grout*, answered in the garnishee action, alleging that on the 23d of October, 1896, the defendant *Smith* and one Sennott each deposited $100 with *Grout*, as stakeholder, on a bet that McKinley would get 100,000 more votes than Bryan in Illinois, *Smith* having the affirmative side of the bet; but that *Smith* did not own the money bet, but made the bet simply as agent for one Milroy, and that Sennott acted simply as agent for another person. The garnishee further answered, alleging that Sennott, November 5, 1896, gave written notice to the bank of which *Grout* was cashier, releasing all claim which he had to the money deposited, and directing payment thereof to *Smith;* that McKinley did in fact receive 100,000 more votes than Bryan in Illinois; and that, before the garnishment action was commenced, Sennott notified the garnishee that he withdrew the release and declared the wager off, and demanded that he, the garnishee, return to him the $100 which he had deposited; and, further, that Milroy

claims the $100 deposited by *Smith*, and also the $100 deposited by Sennott, as winner of the wager. The garnishee submits the question of his liability to the court upon these facts.

The plaintiff's evidence showed that on October 23, 1896, *Smith* and Sennott came to the garnishee, and each left with him $100 in currency, which he placed in his own personal safety-deposit vault with a memorandum which he made at the time, and that he claims no interest in the money himself; that on November 6, 1896, there was delivered to him a written direction from Sennott, directed to the First National Bank, directing the bank to pay all of the money to *Smith;* that the reason that he kept the identical funds in his own deposit box, instead of depositing them to his own credit in the bank, was because *Smith* and Sennott told him that it was a bet, and that he was to hold it until the bet was decided. Upon cross-examination, the garnishee was allowed to testify, against objection and exception, to all the facts alleged in his answer, except as to the ownership of the money and Milroy's claim thereto. The garnishee and the defendant were allowed, as witnesses on their own behalf, and against the plaintiff's objection, to prove all the facts set up in the answer, showing that the money deposited was deposited upon the bet, and that the money put up by *Smith* in fact belonged to Milroy, and that put up by Sennott was deposited as agent for another. The trial court found that the money deposited by Sennott was not his money, and that the money deposited by *Smith* was the money of Milroy, and that *Smith* had no interest therein or in the result of the wager, and gave judgment for the garnishee.

The circuit judge certifies the following questions: "First, was the testimony showing that *Smith* and Sennott acted as agents for others, and had no beneficial interest in the money deposited by them in the hands of the garnishee, competent and proper to be considered by the court, under the circum-

stances stated? Second, was the testimony showing that the money deposited with the garnishee was deposited with him as stakeholder of said wager competent to be considered by the court, under the circumstances stated? Third, was the attempt of Sennott to withdraw the notice to the garnishee, and to declare the bet off, coupled with a demand for the money, sufficient in law to entitle him to a return of the money?"

For the appellants there were briefs by *Mylrea, Marchetti & Bird*, and oral argument by *C. B. Bird.*

For the respondents there was a brief by *Ryan, Hurley & Jones*, and oral argument by *T. C. Ryan.*

WINSLOW, J. If the garnishee was liable at all, it was because he had some of *Smith's* money in his hands or was indebted to *Smith.* R. S. 1878, sec. 2768. When the plaintiff had shown that there was money in the garnishee's hands which *Smith* had placed there, and which the garnishee did not himself claim to own, he rested his case, and strenuously objected to any proof tending to show that the money, though deposited by *Smith*, in fact belonged to Milroy, because he says the garnishee cannot prove an illegal transaction as a foundation for a defense.

The objection was properly overruled. The plaintiff stood in no better position than *Smith.* If Smith could not recover against *Grout*, then the plaintiff cannot recover. *Smith* could not recover of *Grout* the money which was bet by Sennott, because the statute prohibits such a recovery; he could not recover the money deposited by himself, because it belonged to Milroy, and this fact may always be shown. *Harnden v. Melby*, 90 Wis. 5. The plaintiff's objection to the evidence is based on a misconception. Neither Smith nor *Grout* is trying to make title to the money by means of an illegal transaction; but the nature of the transaction is shown, not to enforce it or use it to found title upon, but,

in effect, to set it aside and show to whom the money by law belongs. No rule of evidence prohibits this.

The first two questions submitted are answered in the affirmative; and, as these answers dispose of the case, the third question is left unanswered.

By the Court.—It is so ordered, and the judgment is affirmed.

BARDEEN, J., took no part.

RELYEA, Appellant, vs. TOMAHAWK PAPER & PULP COMPANY, Respondent.

February 2—February 21, 1899.

Constitutional law: Vested rights: Statutory rights: Conditions precedent: Limitation of actions: Reasonableness of time: Injuries through negligence.

1. A right by statute to compensation for injuries can be granted upon condition, or the condition changed as to existing situations, or the right taken away entirely, in the discretion of the legislature. Such rights are not the subject of constitutional protection, but depend solely upon the legislative will.
2. A statute adding some new condition to the statutory right to compensation for an injury, is not a statute of limitations affecting a mere remedy, like a statute of limitations strictly so called, but a law acting upon a right, solely under legislative control.
3. A statutory condition in the nature of a limitation upon the enforcement of a common-law right, such as the right of recovery for injuries to an employee attributable to actionable negligence of the master, is a statute of limitations and does not apply to rights existing at the time of its passage, as to which a reasonable time is not left after such passage to comply with such condition.
4. A statute of limitations in existence at the time of the commencement of an action applies to it in the absence of anything in the act, or any other law, to the contrary.

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5. If a statute of limitations does not recognize existing rights and provide a reasonable time for their enforcement, it is void as to them under the inhibition of the national constitution as to laws impairing the obligations of contracts or taking property without due process of law.

6. If, in a statute of limitations, a time be allowed for the enforcement of existing rights regardless of it, that time will be deemed conclusively reasonable unless the contrary appears beyond a reasonable doubt.

7. If, in a new statute of limitations, a time be not allowed for the enforcement of existing rights regardless of such statute, it will not apply to such rights, unless the time left for the enforcement thereof, by the situation of the parties, judicially appears reasonable, which determination must be made having regard to the facts of each case.

8. A statute creating a condition precedent to the enforcement of the common-law right to damages for bodily injuries attributable to actionable negligence, containing no saving clause as to existing claims of that character, in effect extinguishing a claim as to which the new conditions shall not have been complied with before the expiration of a year after the injury, does not apply to the claim of a minor existing at the time the new statute went into effect, who had but sixty-one days thereafter within which to comply with it.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Lincoln county: CHAS. V. BARDEEN, Circuit Judge. *Reversed.*

Action to recover compensation for a bodily injury received by plaintiff while in the employ of the defendant, alleged to have been caused by actionable negligence for which defendant is responsible. The facts stated in the complaint were sufficient to constitute a cause of action, unless ch. 304, Laws of 1897, applies. It contains the following: "No action to recover damages for an injury to the person shall be maintained unless, within one year after the happening of the event causing such damages, notice in writing signed by the party damaged, his agent or attorney, shall be served upon the person or corporation by whom it is claimed such damage was caused, stating the time and place where

such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made, and that satisfaction thereof is claimed of such person or corporation." Plaintiff received his injury in 1896, leaving only sixty-one days after the act of 1897 to serve a notice as required thereby. He did not attain his majority or commence his action or serve the notice till the expiration of the year after the injury occurred. He was twenty-one years of age July 3, 1897, and the injury occurred June 28, 1896. All the facts stated appear by the complaint. Defendant demurred to the complaint for want of facts disclosed thereby sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff appealed.

For the appellant the cause was submitted on the brief of *J. C. Kerwin.*

For the respondent there was a brief by *A. H. Woodworth*, attorney, and *Curtis, Reid & Smith*, of counsel, and oral argument by *A. H. Reid.*

MARSHALL, J. The sole question presented here is, Was plaintiff's cause of action extinguished by the failure to serve a notice under ch. 304, Laws of 1897? The learned trial court decided that in the affirmative, basing his conclusion, probably, on *Plum v. Fond du Lac*, 51 Wis. 393; *Reed v. Madison*, 83 Wis. 171. They were cases involving the applicability of acts of the legislature adding new conditions precedent to the statutory right to compensation for personal injuries received on public highways on account of the insufficiency thereof. In the *Plum Case* the time left after the passage of the act, for the performance of the new condition, was eighty days, and in the *Reed Case* forty days. The acts were rightly held applicable because the rights affected were purely statutory. While the rule is inflexible that rights not dependent on statute are guaranteed by the national constitution against impairment, either by laws

affecting existing contracts or taking property without due process of law, mere statutory rights may be conferred upon such conditions as in the wisdom of the legislature may seem best, and the conditions may be changed from time to time, even as to existing rights, or such rights may be taken away entirely, at the legislative will. Such rights do not come within the constitutional provision. If the conditions requisite to their existence be once satisfied, a new one may be added as in the two cases cited, and whether the time given in which to comply with it be long or short is a matter exclusively of legislative discretion. True, there is language in opinions, treating of a new condition respecting existing statutory rights, indicating an idea in the judicial mind that a law imposing such conditions takes effect as to such rights if a reasonable length of time be left for the claimant to comply with it; but the real ground upon which the decisions rest is that, the rights being statutory, they are entirely the subject of legislative discretion.

The difference between a statute requiring notice to be served, as for example sec. 1339, R. S. 1878, as a condition of a right to damages for an injury through failure of duty on the part of a municipality to keep its highways in a proper state of repair, and a statute requiring such a notice to be served as a condition of recovery for injuries to an employee through actionable negligence of his employer, is that the former is a condition of the right to damages and the remedy to recover the same as well, while the latter is a condition acting on the remedy alone, the right not being dependent on the statute at all. Such difference is well defined in the books and universally recognized. In *Smith v. Cleveland*, 17 Wis. 556, it is said, in effect, that the difference between laws that the legislature may change at will and those which the constitution protects from interference to the prejudice of vested rights, is that under the former the right is dependent on the law, and under the latter the right itself is

independent of the law. The subject was recently discussed in *Schaefer v. Fond du Lac*, 99 Wis. 333; *Daniels v. Racine*, 98 Wis. 649, where it is said that a right given by statute may be changed by adding new conditions, or wholly taken away by statute. There, as in most cases of the kind, the right of action was spoken of as synonymous with the right itself, and properly so. If the distinction be not kept in mind between statutory and common-law rights, where the court speaks regarding a condition of the former as precedent to a right of action therefor, it will be taken as meaning that the condition is in the nature of a limitation acting on the remedy alone.

From what has been said, it is clear that the rule in *Plum v. Fond du Lac*, and similar cases where the right acted upon by a legislative change of condition upon which the right depended was a creature of statute, does not apply to this case. Plaintiff had a right to compensation for his injuries independent of the statute. He was entitled to six years from the happening of the injury before making any move to enforce such right. In that situation ch. 304, Laws of 1897, was passed, which, it is claimed, extinguished the right in sixty-one days after its passage and more than five years before it would have been extinguished by the statute of limitations as it before existed. While time for the commencement of the action was not in terms changed, the condition precedent to such commencement had that effect, rendering the law essentially a statute of limitations, and it must be so treated.

It is well settled that it is within legislative power to change a statute of limitations regarding the remedy for the enforcement of existing rights, if a reasonable time be allowed to resort to existing remedies, or a reasonable remedy be provided, to enforce such rights. A statute which undertakes to extinguish rights of action without giving such opportunity, is not deemed a statute of limitations, but an

arbitrary, unlawful impairment of a constitutional right. It is further well settled that what is a reasonable time is a matter largely of legislative discretion. If such discretion be once exercised by a saving clause in the act providing for existing causes of action, that is controlling unless, manifestly, the time be unreasonable. That must appear beyond a reasonable doubt, however, in order to justify the court in condemning the law as unconstitutional. Where there is no saving clause in the act and it thereby appears that the legislature did not consider the subject at all, the court must apply it, or not, to causes of action existing when it took effect according as it shall judicially appear that a reasonable time was left thereafter for the plaintiff to commence his action or perform the new condition. Subject to this rule, the statute of limitations in force when an action is commenced governs in the absence of some indication therein, or in some other provision of law, to the contrary. *Woodbury v. Shackleford*, 19 Wis. 55; *Converse v. Burrows*, 2 Minn. 239; *Toland v. Wells*, 59 Ind. 529.

The legal principles thus far mentioned in this opinion are deemed to be too elementary to warrant any extended discussion or citation of authorities in support of them. They may be stated concisely thus: A purely statutory right may be, by the power conferring it, made to depend upon a new condition, or taken away entirely. A statute of limitations, strictly so called, operates on the remedy directly. A statute changing the condition of a right of action for damages given by statute, is a condition precedent to the right to such damages, hence acts directly on the right, and is not a statute of limitations in the ordinary legal sense of the term. Such rights are not protected against impairment, by constitutional guaranties, while rights which exist independent of the statute are so protected. A law changing the time for, or conditions of, the enforcement of a common-law right, is in the nature of a statute of limitations which, if of such a

character as to materially affect the right itself, is within the inhibition of the constitution in regard to the passage of laws impairing the obligation of contracts or taking property without due process of law. A change in the law as to the time for the enforcement of existing rights, or imposing a new condition of such enforcement, which does not allow a reasonable time within which to commence an action for such enforcement or comply with the new condition, is within the inhibition mentioned and is void as to such existing rights, otherwise valid. If a time be specified in a statute of limitations for the commencement of an action to enforce existing rights, or to comply with the new conditions specified therein, showing that the legislature exercised its judgment in the matter, it is not within the jurisdiction of courts to examine the question of the proper exercise of such power, in the absence of a clear abuse of legislative discretion and disregard of constitutional rights. When the new act of limitations does not provide for existing causes of action, yet uses general language applicable to all actions, there being nothing in the act, and no other law, making any exception to its application, it applies to all causes of action, subject to the judgment of the court, as to each such cause, whether the person affected had a reasonable time after its enactment to comply therewith.

It follows that ch. 304, Laws of 1897, does not apply to plaintiff's claim for damages, unless we can say that the sixty-one days allowed for him to comply with it is reasonable. In determining that we are not embarrassed by any determination of the subject by the legislature, for the law made no provision for existing causes of action. That was entirely overlooked, as it appears. How much time is reasonable for a person circumstanced as plaintiff was, to comply with the statutory condition under consideration, must be determined having regard to his being under age and the fact that, while before he had the unconditional

right to begin his action at any time within about five years, after, save on performance of the new condition, his right was extinguished in sixty-one days. What is a reasonable time for the enforcement of existing rights regardless of new conditions of limitation must necessarily vary according to the character of such rights and the class of persons affected, and many other circumstances. Very little light is furnished by a decision as to what is reasonable under some circumstances, to enable one to determine what is reasonable under other circumstances. We are safe in saying, however, that no precedent can be found for holding that a new condition for the enforcement of a common-law right of property, having the effect of changing a limitation of five years to sixty-one days, and making no exception in favor of minors, leaves a reasonable length of time for compliance with such condition. It appears to be so clearly insufficient that discussion and authority in support of that view are unnecessary. The passage of the act without some adequate saving clause as to existing rights was evidently an oversight, as at the first opportunity after its passage the legislature remedied the infirmity by so changing the law as to exempt causes of action existing before such passage. The result is, we hold that ch. 304, Laws of 1897, does not apply to this case, and that the demurrer was improperly sustained.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

BARDEEN, J., took no part.

EXCELSIOR MILL COMPANY, Respondent, vs. HANOVER, Garnishee, Appellant.

February 3—February 21, 1899.

Garnishment: Partnership assets: Fraudulent conveyances.

1. The mortgagee in a chattel mortgage of firm property given to secure a *bona fide* debt owing to him by the partners individually, is not subject to garnishment by the firm creditors after he has sold the property and applied the proceeds upon the debt, even if the mortgage was fraudulent as to such creditors.
2. MARSHALL, J., is of the opinion that a conveyance of firm assets by the members of an insolvent partnership, to pay the individual indebtedness of one of its members, and without any other purpose, is not void as to partnership creditors.

APPEAL from a judgment of the circuit court for Lincoln county: CHAS. V. BARDEEN, Circuit Judge. *Reversed.*

On December 18, 1896, Frederick A. and Clarence G. Hanover, copartners, being insolvent and without expectation of working out of said insolvency, mortgaged their entire partnership stock in trade to the garnishee defendant, *Henry D. Hanover*, to secure the note of Clarence G. Hanover to said *Henry D. Hanover*, the condition being that "said mortgagor shall pay to said mortgagee the sum of one thousand dollars, according to the terms of a certain promissory note executed by the said F. A. Hanover, June 14, 1895, to said *Henry D. Hanover*, payable one year after date, with interest at seven per cent. per annum, which said note was given as a renewal of a note of similar terms and in the same amount, executed and delivered between the same parties about a year prior thereto, and was given to secure a loan made to said Frederick A. Hanover and Clarence G. Hanover, and was used and invested by them in the business of the firm of F. A. Hanover & Son."

There is some evidence that in June, 1896, F. A. and

Clarence G., as a firm, assumed partnership liability for the debt evidenced by said note. The court, however, negatives such promise or assumption in his finding. The note evidenced a debt originally incurred by both partners in 1893, but not as a firm. At the time of making said mortgage the firm were indebted to the plaintiff in the sum of about $550 for merchandise purchased for partnership purposes. The garnishee, within a few days after the making of said mortgage, and before the commencement of this suit, foreclosed the same, and sold the stock of merchandise, realizing therefrom the sum of $1,003.28, which he indorsed upon his note. The plaintiff, having obtained judgment and issued execution, garnished *Henry D. Hanover* in aid thereof. The circuit court held the garnishee liable for the proceeds of the mortgaged property, and rendered judgment against him therefor, from which judgment the garnishee appeals.

For the appellant there was a brief by *Van Hecke & Smart*, and oral argument by *E. M. Smart*.

For the respondent there was a brief by *Curtis, Reid & Smith*, and oral argument by *A. H. Reid*. To the point that an insolvent partnership cannot mortgage its entire assets to secure a private debt of an individual partner large enough to absorb such assets, they cited *Cribb v. Morse*, 77 Wis. 322; *Willis v. Bremner*, 60 Wis. 622; Bates, Partnership, §§ 566, 829; *Whelan v. Shain*, 115 Cal. 326; *Clark v. Patterson*, 158 Mass. 388; *Cron v. Cron's Estate*, 56 Mich. 8; *Forsyth v. Woods*, 11 Wall. 484; *Keith v. Armstrong*, 65 Wis. 225; *Powers v. Large*, 69 Wis. 621; *Vernon v. Upson*, 60 Wis. 418; *Bulger v. Rosa*, 119 N. Y. 459; *Peyser v. Myers*, 135 N. Y. 599; *Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 N. Y. 146; *Jackson Bank v. Durfey*, 72 Miss. 971, and cases cited; *Wiggins v. Blackshear*, 24 S. W. Rep. 918; *Bannister v. Miller*, 54 N. J. Eq. 121; *Hilliker v. Francisco*, 65 Mo. 598; *In re Gray's Estate*, 111 N. Y. 404; *Winner v. Kuehn*, 97 Wis. 394; *In re Weston*, 12 Met. 1; *Turner v. Jay-*

cox, 40 N. Y. 470; *Franklin S. R. Co. v. Henderson*, 86 Md. 452; *Boos v. Marion*, 129 N. Y. 536; *Bartlett v. Meyer-Schmidt G. Co.* 45 S. W. Rep. 1063; *Erb v. West*, 19 So. Rep. 829.

DODGE, J. There were vigorously argued in this case several important questions relating to the rights of the firm creditors against partnership assets when attempted to be applied to private debts of the partners, which, however, it is wholly unnecessary to consider. Here, the partnership property had all been sold to *bona fide* purchasers for value before the garnishment, and the money proceeds thereof had, with consent of both partners, been applied in part payment of the *bona fide* private debt secured by the mortgage, and had been mingled with other moneys.

The cases of *Spitz v. Tripp*, 86 Wis. 25, 28; *Jones v. Kosing*, 92 Wis. 55; and *Salter v. Bank of Eau Claire*, 97 Wis. 84, have fully settled the rule for this court, that whether or not a transfer of property be fraudulent, if that property has been entirely disposed of, and the proceeds are not in any way held in trust for the debtor, but have been applied under his direction or to his debts, garnishment cannot be sustained against even the fraudulent transferee of such property.

In *Spitz v. Tripp*, *supra*, the court, speaking by CASSODAY, J., said: "Under this statute, Tripp cannot be held liable, as garnishee, for any property, moneys, credits, or effects belonging to the principal debtor, which had passed out of his possession or control more than three months prior to the service of the garnishee summons upon him. Had Tripp been garnished by the plaintiffs at any time between July 26, 1892, and September 10, 1892, then the validity of the mortgage, and Tripp's right to hold possession of the goods, would have been involved, and might have been determined. *La Crosse Nat. Bank v. Wilson*, 74 Wis. 398; *Edwards v. Roepke*, 74 Wis. 575. But, upon the facts of this case, it is

immaterial whether the mortgage was valid or invalid, or such possession lawful or unlawful, as against J. L. Tabor's other creditors, since none of them during that time proceeded against the property or Tripp as garnishee."

In *Jones v. Kosing*, *supra*, the court, speaking by MARSHALL, J., said: "Kosing having sold his interest in the property, and parted with possession and control of it, and applied the proceeds in the payment of Adolph Keller's debt to him, before service of the garnishee summons, he cannot be held as garnishee, whether the mortgage and bill of sale were valid or invalid, or his possession was lawful or unlawful, as against the other creditors of Adolph Keller."

The distinction between levying upon the property itself, and attempting to reach the proceeds after the property has been disposed of, is also pointed out in *Powers v. Large*, 69 Wis. 621, and *Coover's Appeal*, 29 Pa. St. 9.

Garnishment, while in many respects serving the purpose of a creditor's bill, is nevertheless limited by the statute. It reaches only property or effects belonging to the debtor in the hands of the garnishee, or indebtedness from the latter to the former, neither of which existed at the time of the garnishment in this case, and as a result the appellant could not be held liable on that process.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in favor of the garnishee defendant.

BARDEEN, J., took no part.

MARSHALL, J. I concur in the opinion of the court so far as it goes, but think the question submitted to the circuit court on which the case turned there, and presented here with much learning and ability by counsel for the respective parties, deserves to be considered and decided. It is not satisfactory to counsel in a cause, or the court from which

the cause is removed to this forum for review, to have some new question discovered and assigned as sufficient to rule the situation, leaving entirely out of view those questions upon which much labor has been expended. For a cause to be so disposed of, where the new discovery is really the only question involved, of course cannot be helped, but that is of extremely rare occurrence and is not the situation here. Where certain questions have been supposed to control a case till submitted on appeal, and they are in the case, it seems that they should be considered and decided, even if some other question be decided requiring the same result.

The learned trial court decided this case in accordance with an affirmative holding on the following question: Is a conveyance of firm assets by the members of an insolvent partnership, to pay the individual indebtedness of one of its members, and without any other purpose, void as to partnership creditors? That decision, it seems, is wrong, and the judgment based on it necessarily wrong, though there have been so many observations in decisions of this court along the line which the learned trial court followed, that it is very easy to see how the judicial mind drifted into a channel which resulted in holding that the use, by an insolvent firm, of any of its assets for any purpose other than to pay partnership debts, is fraudulent and void as to firm creditors.

In *Thayer v. Humphrey*, 91 Wis. 276, the rights of creditors as to the property of an insolvent partnership were carefully considered and determined with such definiteness that it ought to settle the law for this state. The facts were that the firm of J. D. Putnam & Co., composed of J. D. Putnam and A. J. Goss, was hopelessly insolvent. In that situation, Putnam sold out his interest in the firm property to J. B. Goss, and the firm of J. B. Goss & Co. was formed to continue the business with the same assets, the new firm agreeing to pay the old firm debts out of such assets. J. B.

Goss was insolvent when this arrangement was made. The new firm conducted the business for a time, contracted some new debts and paid part of the old liabilities, when an assignment for the benefit of creditors was made. The creditors of the old firm claimed a preference over the new creditors, and whether they were entitled to such preference or not turned primarily on whether the old firm, being insolvent, could make a *bona fide* conversion of its property into that of the new firm, so as to cut off the equity of the old creditors to be first paid. After a very careful study of the subject, that question was unanimously answered in the affirmative. Though two opinions were filed, both were to the effect that if a member of an insolvent firm sell his interest therein to his copartner or a stranger, without intent to hinder, delay, or defraud partnership creditors, and without in any way retaining his equitable right to have the partnership debts paid out of the partnership assets, the dependent right of partnership creditors is thereby extinguished. The only division was in this: The court held that where the agreement in effect is that the partnership debts shall be paid out of the partnership assets, and the circumstances are such as to clearly show that all of the parties intended to devote such assets to that purpose, and there was evidently no other method in contemplation or other way to effect such payment, the court is warranted in holding that thereby the equity of the vendor partner is retained for that purpose. Justices PINNEY and NEWMAN concurred in the idea that the circumstances mentioned were not sufficient to preserve the equity of the vendor partner, hence not of the partnership creditors. All the members of the court approved the rule of *Ex parte Ruffin*, 6 Ves. 119, which, with few exceptions, prevails in this country and England and has for nearly a century. It was decided in 1801, and language there used by Lord ELDON, or its equivalent, has been repeated by most courts and textwriters since that time in stating the

law governing the subject. It is to the effect that creditors of a partnership, solvent or insolvent, have no lien on partnership assets independent of the lien of the members of such partnership; that each of such members has the equitable right to have all firm creditors paid out of the partnership assets before any part of it shall be otherwise used, but that he may waive that right, and, by a *bona fide* sale of the property without in any way retaining such equity, he does waive it; that, acting *bona fide*, the members of a partnership, solvent or insolvent, may use partnership property for the payment of the individual debts of one of the partners, or may divide the partnership property between themselves, or sell the same to a stranger, or otherwise change the character of the assets so as to exclude partnership creditors from any equitable right to be paid in preference to creditors of the new owner; that the sole test of the right of the members of a partnership to deal with the partnership property, regardless of the interests of partnership creditors, is that of *bona fides*, and not of insolvency of the firm; that in such a situation a sale or use of the partnership property by consent of all the members of the firm solely to satisfy, secure, or pay the individual indebtedness of one of the firm, is not voidable as a fraud upon partnership creditors.

It will be seen by a careful reading of *Thayer v. Humphrey*, 91 Wis. 276, that the rule of *Ex parte Ruffin* was made the text of the opinion of the court, as well as that of Mr. Justice NEWMAN. The latter opinion, after citing many authorities, said: "Such sale of a partner's interest in firm property is presumed to be valid." "The authorities are nearly uniform. Only a few cases are out of line." The court, in the majority opinion, said: "The propositions of law are too well established by the great weight of authority to be questioned by this court,— that partnership creditors have no lien on partnership assets independent of the equity of the partners; that so long as the equity of the in-

dividual members of the partnership exists the creditors have the equitable right to compel its enforcement; that if one partner sell his interest in the partnership assets, *bona fide*, to his copartner or a stranger, without in any way retaining his equity to have the partnership creditors paid out of it, the joint property is thereby converted into the individual property of the purchaser."

The same rule is stated as elementary in 2 Lindley, Partnership, 698, as follows: "The creditors of the firm have no lien on its property which can prevent the partners from, *bona fide*, changing its character into the separate estate of one of them. Even if the liabilities of the partnership exceed its assets at the time the agreement is made, still, if the partners act *bona fide*, and not with a view to defraud their creditors, the ownership in that which before the agreement was partnership property will have changed, and the joint creditors of the firm cannot insist on its distribution as joint estate." That is the doctrine of the English courts, the supreme court of the United States, and of most of the states. *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 Ves. 6; *Stuart v. Ferguson*, Hayes, 472; *Ex parte Walker*, 4 De Gex, F. & J. 509; *Ex parte Peake*, 1 Madd. 346; *Ex parte Clarkson*, 4 Deac. & C. 66; 1 Lindley, Partnership, 334, 335; Story, Partnership, §§ 307, 358, 360; Parsons, Partnership, §§ 178, 246, 248, 394; Collyer, Partnership (Perkins's ed.), §§ 894, 904, 905; Jones, Chattel Mortgages, § 44; *Kimball v. Thompson*, 13 Met. 283; *Allen v. Center Valley Co.* 21 Conn. 130; *Hanford v. Prouty*, 133 Ill. 339; *Carver G. & M. Co. v. Bannon*, 85 Tenn. 712; *Gallagher's Appeal*, 114 Pa. St. 353; *Wilcox v. Kellogg*, 11 Ohio, 394; *Ellison v. Lucas*, 87 Ga. 223; *Purple v. Farrington*, 119 Ind. 164; *Poole v. Seney*, 66 Iowa, 502; *Woodmansie v. Holcomb*, 34 Kan. 35; *Hanover Nat. Bank v. Klein*, 64 Miss. 141; *Flack v. Charron*, 29 Md. 311; *Beckwith v. Manton*, 12 R. I. 442; *Rose v. Gunn*, 79 Ala. 411; *Allen v. Grissom*, 90 N. C. 90; *Couchman's Adm'r v. Maupin*,

78 Ky. 33; *Vietor v. Glover*, 17 Wash. 37; *Rice v. Barnard*, 20 Vt. 479; *White v. Parish*, 20 Tex. 688; *Simmons H. Co. v. Thomas*, 147 Ind. 313; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Wilson v. Gamble*, 50 Neb. 426; *Case v. Beauregard*, 99 U. S. 119; *Huiskamp v. Moline W. Co.* 121 U. S. 310.

The foregoing are only a few of the numerous authorities extant on the question discussed. As stated by Mr. Justice NEWMAN: "The authorities are nearly uniform. Only a few cases are out of line."

In *Case v. Beauregard*, 99 U. S. 119, Justice STRONG, in delivering the opinion of the court, said: "By the rule of *Ex parte Ruffin*, which is generally accepted as the law, a *bona fide* transfer of partnership property to an individual changes its character by extinguishing partnership equities. Consequently derivative equities of the creditors, though the firm be insolvent, are at an end. The preference right of partnership creditors depends upon there being partnership property when that preference is sought to be enforced."

In *Kimball v. Thompson*, 13 Met. 283, the partners sold out the partnership property, ignoring the rights of creditors. The lower court held that the sale was *prima facie* void. On appeal, that was reversed, Chief Justice SHAW saying in the opinion: "The sale was *prima facie* valid, subject to be defeated by creditors only by their being able to show that the conveyance was fraudulent."

In *Hanford v. Prouty*, 133 Ill. 339, the court, by Mr. Justice BAILEY, said: "The equitable rule which requires the assets of the firm to be applied to the payment of firm debts is founded, not upon the equities of the creditors, but upon the equities of the partners. It follows that a sale made in good faith by one partner to his copartner or to a third person, of all of his interest in the firm, is as valid to transfer the entire property to the vendee as in a sale between any individuals, although the buyer and seller are insolvent, and they thus defeat partnership creditors; and as the firm cred-

itors have no lien the partner can dispose of the property as his own and pay his separate creditors to the exclusion of joint creditors, or *vice versa.*"

In *Couchman's Adm'r v. Maupin*, 78 Ky. 33, the court, by Justice COFER, said, in effect, that the members of a firm, acting together, have the same freedom in the disposition of the firm property which an individual has to control and dispose of his property; that is, all the partners, by their voluntary act, may waive the lien upon partnership effects, which is a lien for their individual protection, not that of creditors.

In *Purple v. Farrington*, 119 Ind. 164, the court said: "The central question is whether the members of a partnership, largely indebted and insolvent, may mortgage the firm property to secure the individual indebtedness, if in so doing they act in good faith. Where the partnership assets remain under the control of the partners, they have the power to appropriate any portion of it to pay or secure the individual debts of the members of the firm. The mere preference of individual over partnership creditors by the execution of a chattel mortgage in the firm name by the authority of the partners, upon the property of the firm, is not of itself such a fraud upon the partnership creditors as will authorize the setting aside of a mortgage at the suit of a creditor."

All the cases cited are along the same line. Further quotations would unnecessarily lengthen this opinion.

We cannot properly close without referring to the decisions of this court where, as said at the opening, observations are found indicating that the rule of *Ex parte Ruffin*, 6 Ves. 19, was overlooked or rejected. Such cases were not overlooked when *Thayer v. Humphrey*, 91 Wis. 276, was decided, though they are not there referred to. One of the significant cases is *Willis v. Bremner*, 60 Wis. 622. There, in an assignment for the benefit of creditors, a preference to individual creditors of the members of the partnership making the assignment, was involved. The court held the preference

fraudulent. It is not in conflict with *Ex parte Ruffin.* The decision necessarily resulted from the statute pronouncing all conveyances by an insolvent person, in trust for himself, void as to his creditors, a quite well recognized exception to the rule of *Ex parte Ruffin.* Such cases have nothing to do with the subject we here discuss.

Cribb v. Morse, 77 Wis. 322, is often referred to. Justice ORTON, who wrote the opinion, said that the chattel mortgage given by the members of the firm as individuals, on firm property, to secure a debt due from the individuals, was void, "the firm being insolvent." The case seems to have turned on whether the mortgage was a partnership mortgage, or a mortgage given by the members of the firm as individuals, though Justice ORTON did put some stress on the fact that the firm was insolvent. Of the authorities cited in the opinion, one is from New York, where the rule of *Ex parte Ruffin* has been practically rejected; one from New Hampshire, the only state where it is held that creditors have an independent lien upon the property of a partnership; one from the federal district court, based on the New Hampshire rule, ignoring the decision of the supreme court of the United States on the subject. It will be observed that the doctrine here discussed was not necessary to the decision in the *Cribb Case*, and that what is there said should not be considered controlling; and that the authorities cited create a doubt at least as to whether the question received careful consideration.

Another case is *Keith v. Armstrong*, 65 Wis. 225. That, like *Willis v. Bremner*, is where a preference, given to individual creditors in a partnership assignment, was held fraudulent. The general question of the power of the members of an insolvent firm, acting *bona fide*, to convert partnership property into individual property, or use it to pay individual indebtedness, was not in the case. Justice COLE said: "The rule is elementary that a partner cannot appro-

priate partnership funds to the payment of his individual debts, unless the firm at the time be solvent and have sufficient property remaining to discharge all partnership liabilities." That was said by way of argument in regard to an act where all the members of the partnership joined, so the observation must be taken as meaning that the members of an insolvent partnership, acting together, cannot use the partnership property for purposes prejudicial to the rights of partnership creditors, and that the law in that regard is elementary. That is contrary to *Ex parte Ruffin*, 6 Ves. 19, to what the court held in *Thayer v. Humphrey*, 91 Wis. 276, and to what we have shown to be the weight of authority. It was outside the case and, it seems, should not be considered as authority. That the subject was not carefully considered is evident from the following authorities cited in support of the language quoted. *Vernon v. Upson*, 60 Wis. 418, and *Willis v. Bremner*, *supra*, both involved partnership assignments with preferences to individual creditors. Each turned on the statute which prohibits the conveyance, by an insolvent person, of property in trust for his own use. In *Viles v. Bangs*, 36 Wis. 131, the question was, Can a partner, without the consent of his copartner, apply partnership property to the payment of his individual debts? Of course he cannot, but with such consent it seems that he can. *Cotzhausen v. Judd*, 43 Wis. 213, involved the same question. *McLinden v. Wentworth*, 51 Wis. 170, involved the question of whether a new firm, consisting in part of members of an old firm which had dissolved and sold its assets to such new firm, was liable without its consent for the debts of the old firm, and whether a partner can bind his firm for money borrowed by him to pay his part of the partnership capital, the lender knowing all the facts. Neither of those questions involved that referred to by the language in suppqrt of which the case was cited. The last case cited in the opinion is *David v. Birch-*

ard, 53 Wis. 492, which turned on faulty instructions. The power of the members of an insolvent firm, acting *bona fide*, to use firm property regardless of the firm creditors, was not involved. After disposing of the instructions so as to require a reversal of the judgment, the court said in substance that a member of an insolvent firm, even acting *bona fide*, cannot part with his interest in partnership assets with the consent of his copartner, to the prejudice of partnership creditors. An examination of the case and briefs does not disclose that such question was presented in the court below. It appears to have been discussed in this court for the first time. It has the appearance of having been treated without careful consideration. The suggestion in the opinion is contrary to *Thayer v. Humphrey* and the doctrine that the equity of creditors in partnership property is wholly derivative and dependent.

From what has been said it is apparent that the relation between the creditors of an insolvent partnership and the members thereof, and the power of such members as to partnership property in the circumstances presented here, was not carefully considered and decided by this court till *Thayer v. Humphrey*, 91 Wis. 276, or necessarily decided in any previous case. Further, that the authorities elsewhere are quite uniform in support of the conclusion reached in the *Thayer Case*. The theories of courts that hold otherwise are quite numerous. In New Hampshire, as indicated, it is held that the creditors of a partnership have an independent equity in the partnership assets in case of insolvency. In New York and a few other states the idea prevails that insolvency impresses the partnership assets with a trust in favor of creditors; and in a few other states a conveyance of partnership property to secure or pay the individual indebtedness of a member of an insolvent firm has been termed a conveyance without consideration, a gift as it were. The rule of *Ex parte Ruffin*, 6 Ves. 19, is inconsistent

with each of such theories. The idea that mere insolvency impresses the assets of a firm or individual with a trust in favor of creditors, has been repeatedly rejected by this court. The idea that the use of partnership assets for the benefit of a member of the partnership is in any wise a gift, ignores the fact that when so used the partner is chargeable with the property as between him and his copartner. The effect of the partnership relation is to make him pay whatever price is agreed upon between the partners, and, if none be agreed upon, to pay the full value of the property. That such a transaction can be considered in any sense a gift will not bear a moment's examination without disclosing its infirmity.

This opinion has now been extended to a much greater length than was anticipated at the beginning, yet much more might be said. The purpose of it, however, has been accomplished. We have shown that the doctrine of *Ex parte Ruffin* has been adopted in this state and that it is the law as understood in most courts of this country and England; that under such rule the rights of creditors of a partnership, whether solvent or insolvent, in the firm assets, is wholly derivative and dependent; and that they have no lien on partnership assets, only an equitable right to enforce the equity of the partners, which equity such partners, acting *bona fide*, may extinguish at will, regardless of the rights of creditors. Such partners, though of an insolvent firm, may make a *bona fide* sale of the partnership property to one of their number or to a stranger, or convey it to pay individual indebtedness, or allow the same to be sold on execution for that purpose, or may mortgage the same to that end. So long as the property is under the control of the partners, their power over it, acting in good faith, is the same, precisely, as the power of an individual over his individual property. Insolvency impresses no trust upon it, and a conveyance of it for no other purpose than to pay an

individual debt to one of the members of the partnership is untainted with any wrong of which partnership creditors can complain. Testing the decision appealed from by these principles, it is wrong, and the judgment should be reversed because of such error, as well as on the ground stated in the opinion of the court.

No inference is to be drawn as to the position of any other member of the court on the question here discussed, because it is not treated in the opinion of the court. My brethren simply concluded that the point mentioned in such opinion was decisive and that no other question need be considered or discussed.

HUGANIR, Appellant, vs. COTTER, Respondent.

February 3 — February 21, 1899.

Damages: Implied contract: Waiver of tort.

102 323
102 443
102 323
109 185
102 323
114 413
52 LRA 60n

In an action founded on false and fraudulent representations of defendant whereby plaintiff was induced to enter into a contract to cut and bank the timber on certain lands of defendant, the tort being waived and a recovery sought on implied contract, plaintiff cannot recover as damages the profits which he would have made on the performance of the contract had the facts been as represented, but can recover only the amount which the defendant has been enriched or benefited by his false representations.

APPEAL from an order of the circuit court for Lincoln county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed.*

The appeal is from an order setting aside a special verdict and granting a new trial. The facts are stated in the opinion.

For the appellant there were briefs by *Flett & Porter*, and oral argument by *W. H. Flett.*

For the respondent there was a brief by *Van Hecke & Smart*, and oral argument by *E. M. Smart.*

CASSODAY, C. J. This case was here upon a former appeal from a judgment in favor of the plaintiff, and was reversed for error in the admission of evidence. 92 Wis. 1. Subsequently the cause was retried, and at the close of the trial the jury returned a special verdict, to the effect (1) that the defendant, before the execution and delivery of the written contract, did make statements to the plaintiff as to the quantity of timber on the lands described in the contract; (2) that before the execution of the contract he represented to the plaintiff that there were 1,500,000 feet of nine-log timber on the lands; (3) that such representations, so made by the defendant, were made for the purpose of inducing the plaintiff to enter into the contract; (4) that the defendant made such representations as to the size and quantity of the timber with intent to deceive the plaintiff; (5) that the plaintiff relied solely upon the representations so made to him by the defendant as to the size and quantity of the timber; (6) that the defendant knew, or ought reasonably to have known, that the statements made by him respecting the size and quantity of the timber were untrue; (7) that the defendant did not tell the plaintiff that he had no personal knowledge of the quantity of timber on the lands, and that he got his information in relation thereto from others; (8) that the plaintiff did not, before the execution of the contract, go on the land in question and satisfy himself as to the size and quantity of the timber thereon; (9) that the reasonable cost per thousand feet, under all the circumstances, to have logged the timber on the lands in question during the winter of 1891–92, assuming that there were 1,500,000 feet of nine-log timber thereon, would have been two dollars; (10) that it was agreed that the defendant should pay the plaintiff for getting out and placing boom sticks around the logs $25. Thereupon, on motion of the defendant's counsel, it was ordered that such special verdict be set aside and a new trial granted, the costs of the action

to abide the result of the trial, and such order was thereupon entered of record. From that order the plaintiff brings this appeal.

By the written contract between the parties the defendant agreed to pay the plaintiff three dollars per thousand feet for getting in the lumber from the premises described. The jury found that, had there been 1,500,000 feet of lumber on such premises as represented by the defendant, the plaintiff could have gotten in such timber, in performance of the contract, at the reasonable cost of two dollars per thousand feet; that is to say, he would have made a profit of $1,500 on the performance of the contract, had the facts been as represented by the defendant. In the former judgment, the plaintiff recovered such profits as damages; and upon the last trial, as well as the first, the cause was tried by the court on the theory that the plaintiff was entitled to recover, if at all, such profits as damages. The trial court granted the defendant's motion to set aside the verdict and grant a new trial on the ground that, under the pleadings, the plaintiff was not entitled to such profits as damages.

It appears that at the beginning of the first trial the court sustained a demurrer *ore tenus* to the complaint; that thereupon the plaintiff amended his complaint, to the effect that he was induced to sign the contract on the false and fraudulent representations of the defendant as to the size and quantity of the timber, as found by the jury, and that, as a matter of fact, there was much less than half the quantity of timber represented on the lands, and that much of that was of inferior size, and hence that it was much more expensive per thousand feet to get in such timber. Among other things, the amended complaint contains this statement: "Plaintiff hereby waives his cause of action for tort herein, and seeks to recover on implied contract." Such amended complaint also contains two other causes of action, each upon express contract.

Upon the opening of the trial, "counsel for defendant moved that the plaintiff be required to elect between the first cause of action stated in the complaint and the second and third causes of action, on the ground that the first cause of action is a cause of action sounding in tort, and the second and third causes of action are in contract." But the court denied the motion. The court then admitted testimony as to the amount of such profits, against objection, and the trial judge stated: "I think we will proceed upon the assumption that the man may recover the profits if the proof shows the fraudulent representations as charged;" and further observed that it would be understood that all the testimony offered by the plaintiff bearing upon the question of the right of the plaintiff to recover profits under the contract would be taken under the objection of the defendant, as fully as if an objection were made to each question asked. Such rulings of the court were, manifestly, based upon the fact that the plaintiff had expressly waived the tort alleged in the first cause of action, and upon that cause of action was only seeking to recover upon implied contract, in which during the trial the defendant had acquiesced. In the opinion setting aside the verdict, the trial judge said, in answer to the position of counsel for the plaintiff, that "it was tacitly assumed by court and counsel that plaintiff had made his election, and all their efforts were directed to ascertaining and applying the true measure of damages applicable to such cases. Now it is asserted that, because the court allowed profits to be recovered, it was virtually a decision that the action was in tort. I expressly disclaim any such intention. I was then in doubt as to the true rule as applied to cases of implied contract, and, the profits having been allowed on the former trial without question, I followed the former ruling. This decision was based upon the assumption that profits were allowed in cases of implied contract, and not upon a determination that the action was in tort."

The right of a plaintiff to waive the tort and recover solely on the ground of implied contract has been repeatedly and firmly settled by this court. *Barth v. Graf*, 101 Wis. 27, and cases there cited. Such being the state of the record, the only question for consideration is whether the plaintiff could thus waive the tort and recover such profits upon such implied contract. In *Norden v. Jones*, 33 Wis. 605, 606, DIXON, C. J., quoting approvingly from another case, said: "It is a principle well settled that a promise is not implied against or without the consent of the person attempted to be charged by it; and, where one is implied, it is because the party intended it should be, *or because natural justice* plainly requires it, in consideration *of some benefit received.*" *Lee v. Campbell*, 77 Wis. 340; *Limited I. Asso. v. Glendale I. Asso.* 99 Wis. 59. As stated in this last case: "The purpose of such an action is not to recover damages, but to make the party disgorge, and the recovery must necessarily be limited by the party's enrichment from the alleged transaction." Thus, it has been held that "one may waive the tort and sue on the implied contract only in those cases where the defendant has derived some benefit from the tort." *Webster v. Drinkwater*, 5 Me. 319; *S. C.* 17 Am. Dec. 238. It is not the amount of the plaintiff's loss, but the amount of the defendant's gain, which is recoverable in an action upon an implied contract. *Nat. T. Co. v. Gleason*, 77 N. Y. 400; Keener, Quasi-Cont. 200. We must hold that, upon the first cause of action alleged, the plaintiff can only recover the amount which the defendant has been enriched or benefited by his false representations.

By the Court.—The order of the circuit court is affirmed.

BARDEEN, J., took no part.

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117 315

TWO RIVERS MANUFACTURING COMPANY, Appellant, vs. DAY and another, Respondents.

February 3 — February 21, 1899.

Estoppel: Disclaimer of title to land: Record.

1. The plaintiff corporation, being the owner of pine lands, was applied to by defendants to fix a price on certain tracts, including the tract in suit. It gave a price on the other lands, but stated positively to defendants that it did not own the tract in suit. It knew, at the time, that defendants were logging all the pine lands they could profitably purchase in that vicinity and were constantly in the market to buy such lands, and that one B. claimed to own the tract in question under a tax deed and had offered it for sale to others. Relying on plaintiff's disclaimer, defendants bought the tract from B. *Held*, that plaintiff was estopped from asserting its title as original owner of the tract, even though it believed, when it made the disclaimer, that B.'s tax title was valid.
2. The fact that the state of the title was apparent from the record did not prevent an estoppel, the positive disclaimer by plaintiff having been such as to encourage and mislead defendants into expenditure upon the bad or doubtful title. *Gove v. White*, 20 Wis. 425, and *Kingman v. Graham*, 51 Wis. 232, distinguished.

APPEAL from a judgment of the circuit court for Oneida county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed.*

This is an action of ejectment for eighty acres of pine land, with damages for pine timber cut and removed therefrom by the defendants. The action was tried by the court, trial by jury being waived. There was little dispute as to the facts. The plaintiff owns considerable pine land in Forest county, Wisconsin, and was the original owner of the land in suit. For some reason the plaintiff failed to pay the taxes for 1884 upon this parcel of land, but did pay the taxes for the succeeding years, until 1892. One Beyer, of Oconto, took a tax deed upon the land for the tax of 1884, but this tax deed was void by reason of defects in the proceedings, and, through the failure to properly enter the seal upon the record in the register's office, the defects were not cured by

the statute of limitations. The defendants purchased the land of Beyer in October, 1894, for $1,600, and thereafter cut and removed pine timber from the land to the amount of $1,477.56. The defendants, by answer, alleged that the plaintiff, before they purchased of Beyer, and knowing that such purchase was contemplated, represented to the defendants that it did not own said land, and that the defendants purchased said land of Beyer relying on such representation.

The court found, among other things, the facts as to the original ownership of the land by the plaintiff and the issuance of the tax deed to Beyer; and, further, that the defendants have been engaged for ten years in manufacturing and selling lumber at Rhinelander, and in cutting and hauling logs near that city, and in the vicinity of Cavour, Forest county, and during all that time have been in the market for the purchase of standing pine timber in that region, for use in their said business, which facts the plaintiff knew after July 15, 1891; that from July 15, 1891, to October, 1894, the plaintiff was in the market selling standing pine timber in the vicinity of Cavour, where it owned large tracts of timber, and was offering the same to the defendants, including the land in question; that the plaintiff, by letter, made an offer to the defendants, July 15, 1891, to sell a large quantity of pine land in this vicinity, including the eighty-acre tract in question, and that during 1891 and 1892 there was correspondence between the parties concerning the purchase and sale of said land, and also other lands in the same vicinity, but that none of the list were sold, owing to failure to agree upon prices, although $3,000 worth of land near by was sold; that further correspondence took place between the parties during 1892 and 1893 with regard to the purchase by the defendants of timber in this vicinity, from which it clearly appeared that the defendants were desirous of buying all that they reasonably could buy in the vicinity of Cavour; that on the 19th of April, 1894, in a letter, the de-

fendants again asked the plaintiff about the Cavour lands, meaning those described in the list of July 15, 1891, and say: "If you would make us a price on the Cavour lands which would allow us to handle it, we would buy it, and log it the coming winter;" that, in reply to this, the plaintiff wrote, on the same day, that it still owned the lands in the list of July 15th, and offered to sell the same for $15,500, except that at the foot of the letter there was the following sentence: "The east half of the southwest quarter of section 27 we do not own." This is the description of the land in controversy in this action. Further correspondence was had between the parties after this, but the lands were not bought, and the disclaimer of ownership of the tract in question in this suit was never withdrawn or afterwards referred to.

The court further found that in the fall of 1892 the plaintiff knew that Beyer was offering to sell the tract of land in question to one Weed, and in consequence of this knowledge obtained advice as to the validity of Beyer's tax title, and was advised that the statute of limitations had run upon it and made it a good title, which advice the plaintiff accepted, and made the disclaimer of title, believing such to be the fact; that prior to April 19, 1894, Beyer offered the land for sale to the defendants, and the defendants purchased it of Beyer; that the plaintiff's disclaimer of ownership was deliberately and knowingly made, with intent that it should be believed by the defendants to be true and that they should act accordingly, and that said disclaimer was reasonably calculated to induce a person of ordinary intelligence and prudence, in the defendants' situation, to believe it to be true, and to act thereon without further inquiry, and to purchase the land from Beyer; and that such purchase was made from Beyer relying upon the plaintiff's disclaimer as true, and believing that Beyer was the true owner; and that the defendants would not have purchased of Beyer but for said disclaimer by the plaintiff and their belief in its truth.

Further findings were made as to the amount of timber cut by the defendants, and as to the invalidity of the tax deed, and the court concluded that the plaintiff was estopped by its acts to deny the defendants' ownership, and dismissed the complaint; whereupon the plaintiff appealed.

A. W. Shelton, for the appellant, to the point that the representations made in this case do not constitute an estoppel, cited *Meisel v. Welles*, 107 Mich. 453; *Pickard v. Sears*, 6 Adol. & El. 469; *Freeman v. Cooke*, 2 Exch. 654; *Kingman v. Graham*, 51 Wis. 232; *Brant v. Virginia C. & I. Co.* 93 U. S. 326; *Anderson v. Coburn*, 27 Wis. 558; *Gove v. White*, 20 Wis. 425; *Proctor v. Putnam M. Co.* 137 Mass. 159; 3 Washb. Real Prop. (4th ed.), 80; *Brown v. Cohn*, 95 Wis. 90.

For the respondents there was a brief by *H. O. Fairchild*, of counsel, and oral argument by *B. L. Parker*.

WINSLOW, J. The only question in the case is whether the facts estop the plaintiff from asserting its title to the land in question. When, in April, 1894, the defendants applied to plaintiff to fix a price upon the Cavour pine lands, including the eighty acres in controversy, the plaintiff, after giving a price upon its other lands in that vicinity, stated positively that it did not own the lands in suit. It is clear that the plaintiff then knew that the defendants were logging all the pine lands they could profitably purchase in that vicinity, and were constantly in the market to purchase such lands, and that Beyer claimed to own this eighty acres and had offered it for sale to others. Had it appeared that the plaintiff knew that the defendants were negotiating with Beyer for the purchase of the eighty, or were about to negotiate with him, we apprehend there could be little contention but that an estoppel would take place if the defendants bought of Beyer relying on the disclaimer. True, the plaintiff believed its statement to be true, and hence was not guilty of intentional deceit or of making a knowingly false statement; but the disclaimer would have been one delib-

erately made, with intent to influence the act of another who was known to be about to act upon the truth of the representation, and the making of such a statement, even in ignorance of its falsity, would have amounted to such culpable negligence as would be the equivalent of fraud. *Coleman v. Pearce*, 26 Minn. 123; *Hendricks v. Kelly*, 64 Ala. 388; *Mayer v. Erhardt*, 88 Ill. 452; *Kingman v. Graham*, 51 Wis. 232; *Leather M. Bank v. Morgan*, 117 U. S. 96; 2 Herman, Estoppel, §§ 771, 772.

But it is said in the present case that the disclaimer was not made with any knowledge that the defendants proposed to act thereon, and hence is but a mere casual statement, which cannot be the foundation of an estoppel. The general rule is that the statement relied on as an estoppel must be made with intent that it be acted upon, and with knowledge that the other party is contemplating such action; but it by no means follows that the intended action must be definitely and positively known to the maker of the statement. If the circumstances are such that a reasonable man, under the circumstances, would anticipate that it was to be acted on, it will be sufficient. The principle is well expressed in *Kingman v. Graham, supra*, in the following words: "If there is a positive misrepresentation, it in general suffices if it be made either with the intention that another should act upon it, or with knowledge that he is about to act, or under such circumstances that a reasonable man would know that it would be acted upon." Herman says that the party estopped must have "had reasonable ground for supposing that the person whom he was misleading would act upon what he was saying." 2 Herman, Estoppel, § 775.

Under the circumstances of the present case, it seems to us clear that the plaintiff had reasonable ground to apprehend that the defendants would purchase the land of Beyer, if they could do so, after the disclaimer of title was made. Its officers knew that the defendants were looking for such land to purchase, and that Beyer, and no one else, was re-

cently offering this parcel for sale. A very small degree of business sagacity would suggest to any mind the probable result of these conditions.

It is said that the state of the title was apparent from the record, and was, or might have been, as well known to the defendants as to the plaintiff, and hence that there can be no estoppel; and reliance is placed upon *Gove v. White*, 20 Wis. 425, and *Kingman v. Graham*, *supra*. The first of the cases involved the question simply as to whether a party could be estopped by oral declarations from asserting the true boundary of land, when the boundaries were clearly set forth in the deeds which the party claiming the estoppel had in his possession. The second is a case where mere silence was asserted as a ground of estoppel, and it was held that, where the title appears of record, mere silence will not estop the true owner from asserting his title. But, in the same case, the case of *Knouff v. Thompson*, 16 Pa. St. 357, was cited with approval, as follows: "The party who has placed his written title on record has given the notice which every person is bound to know and respect. The law does not require him to go further. But, if he speaks or acts, it must be consistent with his recorded title. The law distinguishes between silence and encouragement. While silence may be innocent and lawful, to encourage and mislead another into expenditure on a bad or doubtful title would be a positive fraud that should bar and estop the party,—the author of that encouragement and deception,—from disturbing the title of the person whom he misled, by any claim of title in himself." The application of this principle to the present case is so plain as to render comment unnecessary. The judgment of the court below was right, and should be affirmed.

By the Court.—Judgment affirmed.

BARDEEN, J., took no part.

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GILBERT, Respondent, vs. PIER, Appellant.

February 3 — February 21, 1899.

Counties: Estoppel: Mistakes of officers: Tax titles: Limitations: Exemptions: Presumptions.

1. A public corporation is not estopped by mere mistakes of its officers in performing their official duties imposed upon them by law.
2. A county is not estopped from claiming title to lands which, as lands of the county, were exempt from taxation, by reason of the acts of officers in taxing the lands, selling them for the taxes, and stating at the time of the tax sale that the county had no interest in the lands, although the purchaser relied upon such statement in purchasing at such sale and thereafter taking a tax deed.
3. The provision of sec. 1191, R. S. 1878, that the county shall be the exclusive purchaser at a tax sale of lands upon which it already holds a tax certificate does not prevent the statute of limitations running in favor of a tax deed based on a tax sale of such lands to a different purchaser, where the lands were not exempt from the taxes for which such sale was made.
4. Under the provision of sec. 1191, R. S. 1878, that lands shall be exempt from taxation when a tax deed shall be issued to a county and it shall hold the certificates of tax sales for two successive years subsequent to the sale on which such deed shall issue, there is no presumption that the county to which a deed is issued holds the certificates of such other sales, although the section provides that the county shall be the exclusive purchaser at such sales, since the former owner may have paid the taxes for those years; but where the lands are subsequently taxed and sold for taxes to another person the presumption is, rather, that the lands were then subject to taxation.

APPEAL from a judgment of the circuit court for Lincoln county: CHAS. V. BARDEEN, Circuit Judge. *Reversed.*

Action to quiet title to land, involving the validity of a tax deed under which defendant claimed the land. The facts are stated in the opinion.

Harriet H. Pier, for the appellant.

For the respondent there was a brief by *Brown & Pradt* and *F. E. Bump*, and oral argument by *Neal Brown*.

MARSHALL, J. June 9, 1886, Lincoln county in due form of law acquired title to a tract of land by tax deed based on a tax sale of 1883. December 21, 1896, the county by quitclaim deed conveyed the land to plaintiff. There was no question on the evidence but that plaintiff was entitled to recover by virtue of the title thus acquired, unless defendant was the owner of the land under a tax deed made to her in due form of law, based on a tax sale of the land for taxes of 1889. The latter tax deed plaintiff contended was void because the lands were exempt from taxation for the year 1889, being county land. Defendant answered that contention by saying the proof was insufficient to show exemption from taxation under the statute, and further, that plaintiff possessed under his quitclaim deed no better title than his grantor, and that the latter was estopped from claiming title before conveying the land to plaintiff because of the previous conveyance to defendant, and because of the taxing of the land in 1889, the sale for such taxes, and representations made by the county treasurer at the time of the tax sale that the county had no interest in the land, upon which defendant relied in purchasing at such sale and thereafter taking the tax deed.

The rule is well settled that a public corporation is not estopped by acts of its officers and agents in excess of their powers; nor by omissions or mistakes of officers in performing duties specifically enjoined upon them by law, as distinguished from duties imposed upon the corporation itself. Every person in dealing with an officer of a corporation is presumed to know the extent of his powers and the capacity in which he acts in the particular case.

Numerous instances may be found, some of which are cited in the brief of appellant's counsel, where a public corporation has been held estopped by its corporate acts irregularly performed, as by so issuing corporate bonds. Instances where corporations have been held bound by mere

mistakes of officers in performing their statutory duties are contrary to the settled law. *Adams Co. v. B. & M. R. Co.* 39 Iowa, 507, is such an instance. It is relied upon by appellant's counsel. It will be seen by reference to *Adams Co. v. B. & M. R. Co.* 55 Iowa, 94, that the Iowa court recognized the rule established there by early decisions to be contrary to the general rule on the subject. Such general rule, that the corporation is not bound or estopped by the mere mistakes of its officers in performing their official duties, will be found stated, and supported by numerous authorities, in Throop, Pub. Off. §§ 551, 593. The following cases in this court are to the same effect: *Hoffman v. Chippewa Co.* 77 Wis. 214; *Cady v. Bailey*, 95 Wis. 370; *Smith v. Barron Co.* 44 Wis. 686.

It is clear that the levy of taxes upon the land while it was exempt, if such were the fact, the return of the land delinquent for the nonpayment of such taxes, the sale that followed and statement made at the time of such sale, and the making of the tax deed, were all mistakes, if mistakes at all, of the officers of the town where the land is situated and officers of the county in the performance of their official duties imposed upon them by law,— not corporate acts strictly so called. Hence the county was not estopped or affected in any way thereby. In contemplation of law, the defendant acted from first to last with full knowledge of the whole situation, and therefore has no reason to complain.

Was the land subject to taxes for the year 1889? That is the remaining question. By secs. 1034, 1038, and 1191, R. S. 1878, it was not so subject to taxation if the county then held, in addition to its tax title based on the sale of 1883, two tax certificates of sale unredeemed for two years subsequent to such sale. We are unable to find evidence in the record to satisfy that call of the statute; neither does it appear that the conclusion of the learned trial court as to ex-

emption from taxation was based on that as one of the statutory requirements. It was found that the county held a tax deed, and that was the sole circumstance upon which exemption from taxation was found. The other requisite — ownership of two tax certificates unredeemed for two successive years subsequent to the sale upon which the tax deed was issued — was overlooked, as appears.

But it is said by plaintiff that by sec. 1191 the county, only, was entitled to purchase the land at a tax sale thereof upon which it already had a tax certificate, hence the sale to defendant was void. That may be admitted; but still she did purchase at the sale, took the tax certificate, and thereafter obtained a tax deed in favor of which the statutes of limitation were set in operation. Such statutes were properly pleaded and insisted upon, and were effectual to bar the claim of the plaintiff in the absence of a showing that the lands were in fact not subject to taxation for the taxes upon which defendant's deed was based.

It is suggested that, as the lands were subjected to taxation for the two years after that on which the county tax deed was based, and the county only was entitled to purchase at a tax sale for such taxes, it should be presumed that it became the purchaser and was in fact the owner of two certificates of sale required by the exemption provision of the statute. The difficulty with that logic is that it leaves out a very important premise,— the fact that the former owner may have paid the taxes for subsequent years. When that is considered, so as to make the premises complete, all room for the presumption suggested disappears. If any presumption, then, is to be indulged in, it would seem to be against the ownership of the two certificates required to satisfy the exemption provision, because sec. 1191 requires the county clerk annually to furnish the assessor of each town in his county a list of the lands in such town exempt under such section, in order to prevent an improper levy of taxes

thereon. Presuming that such duty was performed, and correctly, and that the officers of the town properly paid attention to it, the land was subject to taxation for 1889, and the difficulty arose solely by reason of the county treasurer's permitting the defendant to become the purchaser instead of bidding the land in for the county.

It follows that the decision of the trial court, that defendant's deed was void because the land was exempt from taxation in 1889, cannot be sustained. Inasmuch, however, as the ownership of tax certificates, so as to render the land exempt from taxation, on which the case turns here, does not appear to have occurred to the trial court or been presented to him, but suggested here for the first time, it is considered there should be a new trial on that one subject.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a rehearing on the single question of whether the county, in 1889, was the owner of two certificates of sale unredeemed on the land for two successive years subsequent to the date of the sale on which the county tax deed was based; and if that fact be found in plaintiff's favor, to render judgment against the defendant according to the prayer of the complaint; otherwise, in favor of the defendant.

BARDEEN, J., took no part.

PIER, Respondent, vs. ONEIDA COUNTY, Appellant.

February 3—February 21, 1899.

Statutes: Amendment and repeal: Invalid tax certificates: Refund: Division of county: Severance of claims on certificates and deeds.

1. Rightful claims for refund upon invalid tax certificates under sec. 1184, R. S. 1878, upon which suit had been brought prior to the enactment of ch. 215, Laws of 1897, were not defeated by the latter act, although the invalidity was by reason of irregularities not affecting the groundwork of the taxes.

2. The fact that lands covered by invalid tax certificates had, prior to the application for a refund, passed out of the limits and jurisdiction of the county which issued such certificates, does not release such county from the obligation to make the refund.

3. The holder of invalid tax certificates held, also, tax deeds on the same lands based on prior sales. Such deeds were invalid and were surrendered for cancellation. All the claims for refund on such certificates and deeds were brought to the circuit court at the same time by appeal from the county board, but, by the consolidation of various different claims pursuant to stipulation of the parties and order of the court, the claim upon the certificates in question became separated from the claim on the deeds on the same land. *Held*, that such severance should not, under the circumstances, defeat a recovery upon the certificates.

APPEAL from a judgment of the circuit court for Oneida county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed.*

Plaintiff, in May, 1895, duly surrendered, for refund, tax certificates upon sales for taxes for the years 1889 to 1892, on certain lands in *Oneida* county, which certificates were invalid for various reasons not affecting the groundwork of the taxes. Her claims being disallowed, she appealed to the circuit court. She also had sundry other claims upon invalid tax deeds and certificates, which were presented to, and disallowed by, the county board, and appealed to the circuit court at the same time with those involved in this action, amongst others being claims upon two tax deeds, one issued in 1892 upon the sale of the year 1889, and the other issued in September, 1893, based upon tax sale of 1890, which deeds covered some of the same lands included in the certificates involved in this action. The court found that both of said deeds were invalid. The lands here involved are within the territory which, by ch. 150, Laws of 1893, taking effect April 15, 1893, was included in the county of Vilas. The circuit court rendered judgment for the plaintiff for the refund of the various taxes covered by the certificates involved, from which judgment the defendant appeals.

Sam S. Miller, for the appellant.

Harriet H. Pier, for the respondent.

DODGE, J. The defendant concedes the invalidity of all these certificates, and the presentation and disallowance of the claims thereon by the county board, but objects to the judgment on three grounds: First, that by ch. 215, Laws of 1897, sec. 1184, R. S. 1878, authorizing the refunding of money paid upon invalid tax certificates, was so limited as to exclude this cause of action, the invalidity in these certificates being by reason of mistake or irregularity not affecting the groundwork of the tax; second, that the lands involved were in the county of Vilas, so that the county of *Oneida* could not reach them to reassess these taxes thereon at the time plaintiff's claims were presented; and, third, for the reason that it appeared that plaintiff held tax deeds to certain of the lands covered by these certificates, so that the purchase of the certificates ought to be deemed merely a payment of the tax, and refundable only in case of a surrender and cancellation of the deeds, and in connection therewith, as subsequent taxes.

1. Ch. 215, Laws of 1897, cannot be held to exclude any rightful claims for refund upon invalid certificates existing at the time of its passage. Its language is entirely consistent with only a prospective effect, and it cannot be construed to be retroactive, in the absence of clear and express provision. *Boorman v. Juneau Co.* 76 Wis. 550, 554. Especially, in view of the provisions of sec. 4974, it cannot be held that the act of 1897 could be effective to repeal sec. 1184, as to the liability of the county theretofore existing, and upon which suit had already been brought before the enactment of the repeal.

2. The fact that the lands covered by the certificates in question had, prior to the application for a refund, passed out of the limits and jurisdiction of *Oneida* county, cannot defeat the plaintiff's right to recover. It was to *Oneida* county that the money had been paid; it was *Oneida* county which had contracted to make the plaintiff a good tax title, from the breach of which contract the duty to refund results (*Pier v.*

Oneida Co. 93 Wis. 463); and it is clearly the county board of the same county which issued the certificates which, by sec. 1184, is authorized and required to cancel the same and refund the money. Whether or not that county board has been prevented from exercising the power of reassessment, under sec. 1186, by a transference of the lands from its jurisdiction, is a question which cannot concern the plaintiff.

3. The contention of the defendant that, because the plaintiff holds tax deeds based on taxes prior to those for which she holds some of the certificates, her purchase of the certificates should be deemed to be a payment of the taxes, is met by the fact, found in this case, that those deeds are invalid and have been surrendered for cancellation, so that the plaintiff is entitled to refund, not only of the taxes on which said deeds were issued, but all subsequent taxes. Doubtless, as defendant contends, the regular and proper proceeding contemplated by sec. 1184 is that where a deed, held by a party who has paid subsequent taxes, is canceled, the entire amount of the refund on that property should be ascertained and paid upon the surrender of the tax deed; but in this case all of these claims were brought to the circuit court at the same time, and various different claims were consolidated by stipulation of the parties and order of the court, whereby, apparently, the claim upon the certificates here involved became separated from the claim upon the deeds to the same land. All of said cases being before the same court, this method of consolidation having been by stipulation, and there being no exception thereto, the plaintiff should not thereby be prevented from recovering all to which she is entitled. No possible injury can result to the defendant from the recovery by the plaintiff upon these certificates in this action and upon the deeds in another. Our holding upon this question should not be understood as generally authorizing a severance between the deed and subsequent certificates upon the same property in claims for refund, but is applied only to

the peculiar and unusual situation here, where the separation has been made by the consent of both parties and the court, for convenience in trial and consideration of certain questions presented.

By the Court.—Judgment affirmed.

BARDEEN, J., took no part.

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MENZ, Respondent, vs. BEEBE, Appellant, and another, Respondent.

November 22, 1898 — March 14, 1899.

(1, 2) *Appeal: Review: Findings of fact.* (6, 7) *Reversal for mistake not brought to attention of trial court: Modification and affirmance of judgment.* (3, 4) *Fraud: Rescission of contract: Accounting by wrongdoer.* (5, 6) *Costs: Discretion.*

1. On appeal from a judgment in an action tried by the circuit court without a jury, on exceptions to the findings of fact the evidence will be examined in respect to whether it sustains such findings, but error is presumed against, and unless clearly shown the decision of the trial court will not be disturbed.
2. Under the foregoing rule all fair doubts are to be resolved in favor of the decision rendered below; and the distance between clear preponderance of evidence on one side of a controversy and preponderance on the other is so great that the decision below on a question of fact is not easily or frequently disturbed.
3. When a person falsely represents the character or value of property for the purpose of inducing another to part with the same by a sale or exchange for other property owned by him, and relying thereon such other makes the sale or exchange, he may rescind the transaction within a reasonable time after discovering the fraud, by returning or offering to return what he received, and compel a restoration to his former situation.
4. In case of a rescission of a fraudulent transaction as stated, the fraudulent vendee becomes a trustee for his vendor and liable to account for all property received from him; and in case he is unable to restore all the property, then to account for the value, when ob-

tained, of that which he cannot restore, with interest; or if he has sold it for more than its fair value, then to account for the amount so received, with interest, the rule being that the fraudulent vendee has no right to profit by his fraud.

5. Though costs in an equity case are in the discretion of the court, that means a legal discretion—not mere arbitrary judicial will; and unless a person has been called into court by another or prejudiced by him in some way in the action, there is nothing for the discretion of the court to act upon in mulcting such other in costs.

6. A person is not entitled to a reversal or costs on appeal because of a plain error against him in the allowance of a small amount of interest, where the error is so plain that it could readily have been corrected by an application in the court below and no such application was made.

7. A judgment in an equity case may be modified on appeal and affirmed as modified.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Modified and affirmed in part; reversed in part.*

This action was brought to rescind an exchange of real estate made between plaintiff and defendant *Beebe*, on the ground of fraud, and for appropriate relief restoring plaintiff to his former situation. Defendant *Bohn* was made defendant as a purchaser from *Beebe*, with notice of the fraud complained of. He answered denying bad faith on his part and claiming to be a *bona fide* purchaser. *Beebe* answered, and the issues of fact raised by the pleadings were decided by the court substantially as follows:

Plaintiff was the owner of 120 acres of land known as the Sun Prairie farm, and certain other real estate, and some personal property described in the complaint, situated in Dane county, Wisconsin, the real estate being worth $5,600, incumbered for $2,950, and the personal property being worth $1,093.55. Defendant *Beebe* owned a tract of land in the state of Tennessee consisting of about 323 acres, worth $646. Plaintiff was an uneducated man, weak in mind and

body, his condition being such that at intervals he had the appearance of being confused and unable to comprehend the relation of things. He was a simple-minded man, of confiding disposition, and was weak in mind and body, as stated, during all the times mentioned in the findings. October 5, 1893, while plaintiff and *Beebe* were circumstanced, and the conditions existed, as stated, the latter, for the purpose of inducing the former, who knew nothing of the facts, to trade the Dane county property for the Tennessee property and $200, knowingly and falsely represented that the latter was heavily timbered, valuable for farming, and worth from $15 to $20 per acre. Upon the faith of such representations, and not otherwise, plaintiff agreed to make the exchange as proposed by *Beebe*, and accordingly, on that day, proper instruments were duly executed; those transferring the Dane county property to *Beebe* were duly delivered and properly recorded. Thereafter the parties together visited Tennessee, and there, on the 13th day of October, 1894, plaintiff still having no personal knowledge of *Beebe's* property, but relying on his representations as to its value and character, and not otherwise, accepted the deed thereof, and thereafter caused the same to be properly recorded.

The representations made by *Beebe* as stated were false, there being very little timber on the land, and none of value, and the land being unfit for cultivation and not worth to exceed two dollars per acre. Plaintiff did not comprehend how he had been deceived and defrauded by *Beebe* till shortly before the commencement of this action, and upon his understanding the situation in that regard he demanded a rescission of the whole transaction, offering at the same time to fully restore *Beebe* to his former situation. *Beebe* paid the incumbrances on the Dane county land, mortgaged the farm for $3,000, and contracted in writing to sell the same to defendant *Bohn* for $6,000, $500 of which was paid down and the balance in fifteen years absolutely, the net

receipts of the farm, in the meantime, to be applied annually on the purchase money, and the deferred payments to bear interest at the rate of six per cent. per annum payable annually. *Bohn* acted in good faith, without notice of any wrong to plaintiff in his transaction with *Beebe*. *Beebe* received on the land contract before this action was commenced, in addition to the down payment of $500, two instalments of interest of $330 each, and after the action was commenced, upon a third instalment of interest falling due, *Bohn* deposited it in the Deerfield Bank for the use of whomsoever the court in the action should decide was entitled thereto.

On the facts above stated the trial court decided that plaintiff was entitled to a rescission of the land trade, to have all the instruments made to effect such trade adjudged void, saving only the rights of *Bohn* and the mortgagee, the judgment to be so framed as to divest and revest the titles accordingly, to judgment against *Beebe* for $1,093.55 worth of personal property received by him of plaintiff and $1,160 received on the *Bohn* contract, less $200 received by plaintiff on the land trade, making in all $2,053.55, and in addition thereto interest on the sums mentioned from the time *Beebe* received the same, and to judgment awarding plaintiff the special deposit of $330, and costs against *Beebe*. The court further decided that *Bohn* should recover costs against *Beebe*. Exceptions were filed to the court's findings and conclusions. Judgment was rendered in all respects according to the foregoing, from which *Beebe* appealed.

For the appellant there were briefs by *Bushnell & Hall*, and oral argument by *A. R. Bushnell* and *F. W. Hall*.

Geo. W. Bird and *Henry T. Ames*, for the respondent *Menz*.

Herman Pfund, for the respondent *Bohn*.

The following opinion was filed December 16, 1898:

MARSHALL, J. There is no question of law presented for consideration in this case. No claim is made but that the

findings of fact support the conclusions of law, and, in the main, that the conclusions of law support the judgment, the only contention as regards the last proposition being that some errors were made in the accounting between appellant and plaintiff, and that costs should not have been awarded to *Bohn* against appellant. From this statement of the situation it will be seen that the burden of appellant's argument is to show that the trial court should have found differently on the facts, and to that end the learned counsel for appellant have, at great labor, prepared and presented here a printed book of 324 pages, which has been examined with all the care that should be bestowed upon the case in order to properly review so much material and determine where the truth lies, without being able to discover with clearness wherein the learned trial court erred as to the facts.

It should not be forgotten that this court does not try causes *de novo* in the strict sense of the term, even where they were tried below without a jury; that the evidence is not examined and weighed with the degree of exactness required in trying a case originally. While it is true that on an appeal in an equity case, or one tried by the court without a jury, the evidence is to be examined and weighed, where errors are properly assigned on proper exceptions, at the same time error is presumed against, and the findings cannot be disturbed unless clearly against the preponderance of the evidence. *Stanhilber v. Graves*, 97 Wis. 515; *Clausen v. Hale*, 96 Wis. 100; *Momsen v. Plankinton*, 96 Wis. 166; *Magee v. Miss. R. L. Co.* 95 Wis. 377. It seems a work of supererogation to call attention to a rule that has so long been given the significance that attends its reiteration in opinions filed at nearly every sitting of the court for many years. We repeat what was said quite recently,— such rule does not appear to be appreciated by many even who are learned and worthily eminent in their profession. That great earnestness to serve clients, and long-continued men-

tal effort to see a proposition in a particular way, should bias the mind and render difficult the duty of facing the record as it is and seeing things from the standpoint of impartiality necessary to determine with some degree of certainty the probable result of subjecting the record to the test of impartial judicial examination under the rules governing it in an appellate court, is most natural. To do that it must not be lost sight of that there is a wide range between clear preponderance of evidence on one side of a controversy and preponderance on the other; that it is so wide that when all fair doubts are resolved in favor of the facts as determined by the trial court, necessarily the cases are few where this court can properly disturb such determination.

We do not deem it advisable to quote here the evidence from the record which influences us to the conclusion we have reached. It is very voluminous. We could not quote from it at all with any satisfaction without greatly burdening the opinion with matter that would be of no benefit in future cases. To our minds the evidence is ample to sustain the decision of the learned circuit court, that plaintiff was a weak, simple-minded man; that *Beebe* was right the reverse; that he secured the confidence of plaintiff and falsely represented the Tennessee land both as to character and value in order to secure therefor, from plaintiff, some over $3,000 in value of property, for property worth between $800 and $900; that the scheme, without fault on plaintiff's part, succeeded, and that plaintiff commenced this action to avoid the transaction within a very short time after he comprehended the fraud that had been perpetrated upon him. The case is complete on the facts found, and the evidence to sustain such facts appears to be very strong and convincing.

It is contended that the relief granted is excessive, but the reason assigned for such contention shows, as the fact is, that the decree only required the appellant to restore

what he obtained from plaintiff so far as it was in his power to do so, and to respond in money for such portion of the property obtained from plaintiff as he was unable to restore. The title to the Sun Prairie farm was revested in plaintiff subject to the contract with *Bohn*, and appellant was required to pay to plaintiff the sums he had received on such contract with interest. He was also required to restore the personal property by paying to plaintiff the value of it at the time the trade was made, less the $200 plaintiff then received, with interest. No account was made of interest and taxes paid by *Beebe* on the one side, or the use of the Dane county land on the other, which fairly offset each other. That appears to be in exact accordance with the repeated decisions of this court heretofore made, as is well said by counsel for respondent. *Cole v. Getzinger*, 96 Wis. 559; *Swihart v. Harless*, 93 Wis. 211; *Porter v. Beattie*, 88 Wis. 22. The rule is elementary that a court of equity, having jurisdiction to rescind a sale of property on the ground of fraud, and to restore the parties to their former situation, may, where such restitution cannot be accomplished by reason of the defendant's conduct, so shape the decree as to require him to make compensation in money in lieu thereof, and that compensation may reach so far as to include the value of all property that cannot be restored, or that which the wrongdoer may have received therefor, with interest. If it appears that he received more for the property than it was worth when obtained by him from the injured party, the whole amount must yet be considered as belonging to the injured party. The wrongdoer cannot rightfully obtain any benefit from his wrongful conduct. *Milwaukee Co. v. Hackett*, 21 Wis. 613.

The transaction in this case having been rescinded, the wrongdoer immediately became a trustee for plaintiff of all of the property the latter conveyed to the former, and liable to account therefor *in specie* so far as possible, and for

the proceeds of such as had been disposed of in the meantime, or the reasonable value of such property if placed beyond the reach for less than its fair market value. And in addition interest may properly be added. The judgment in this case was framed on the lines indicated, and is right, tested by principles so well established as not to require extended discussion to show either their existence or their applicability to the facts.

On the subject of whether the trial court was right in rendering judgment for costs against appellant in favor of *Bohn*, the former must prevail. True, costs may be allowed in a case like this in the discretion of the court (Stats. 1898, sec. 2918), but, as said in *Spengler v. Hahn*, 95 Wis. 472, the discretion mentioned means something more than mere arbitrary judicial will. In some way it must appear that the person awarded costs has been called into court, or put to expense, or prejudiced in the action by the act of another against whom the costs are awarded, else there is nothing for the discretionary power of the court to act upon in saying that such other shall thus respond to such person. Appellant did not cite *Bohn* to appear in court or make any claim in the action adverse to him. On the contrary, the position of one was identical with that of the other so far as *Bohn's* rights were concerned. It was plaintiff who cited *Bohn* to appear, and on a charge that he was a participant in *Beebe's* fraud. That *Bohn* denied. The charge made by plaintiff and the denial by *Bohn* was the issue for trial between them. On that issue *Bohn* prevailed, and he was clearly entitled to costs against plaintiff as a result, not against *Beebe*.

The result of the foregoing is that appellant must prevail as to defendant *Bohn*, but not otherwise. The charge for printing justly chargeable to that branch of the appeal, and recoverable by appellant against *Bohn* in this court, is fixed at $15. The judgment appealed from as to *Menz* is affirmed,

but as to costs in favor of *Bohn* it is reversed. Full costs are allowed to respondent *Menz* against appellant, and the latter is allowed attorney's fees and $15 for printing against respondent *Bohn*.

By the Court.—So ordered.

Upon a motion by the appellant for a rehearing there was a brief for the appellant by *G. S. Martin* and *Bushnell & Hall*, and a brief for the respondent *Menz* by *Mylrea & Bird*, counsel.

The following opinion was filed March 14, 1899:

MARSHALL, J. A motion for a rehearing, made by counsel for appellant, has been considered with the following result:

The trial court charged *Beebe* with $1,093.55 for personal property obtained by him from respondent, and sums of principal and interest received on the *Bohn* contract, making in all $2,253.55, and deducted therefrom $200 paid by *Beebe* to respondent at the time of the trade, leaving a balance due the latter on the accounting, of $2,053.55. On that, the court said interest should be computed in respondent's favor at the rate of six per cent. per annum as follows: On $1,093.55 from October 5, 1893; on $500 from October 8, 1894; on $330 from October 8, 1895; and on $330 from October 8, 1896. The several items aggregated $2,253.55. The court evidently forgot to deduct the $200 from the $1,093.55, which resulted in wrongfully charging *Beebe* with interest on $200 from October 5, 1893, to the date of the judgment, the error being $50.36. That error would have been corrected by the trial court if attention had been called to it. No appeal for that purpose was necessary. The subject not having been called to the attention of the lower court before the appeal was taken, but raised for the first time, as it appears, in this court, it cannot count in appellant's favor sufficiently to entitle him to costs. *Windross v.*

McKillop, 98 Wis. 525. A reversal is not necessary to correct that error now. The judgment here may be modified to the extent of $50.36, and affirmed as modified, under the express language of sec. 3071, Stats. 1898. In making the suggestion in *Windross v. McKillop*, that a reversal is necessary in such a case, referring to Supreme Court Rule XXXII, we all overlooked the fact that such rule, as indicated by the decisions cited thereto, applies only to cases where a new trial below, or some proceedings there, are necessary. The error in the interest was not specifically excepted to, nor was error clearly assigned therefor, nor was any mention of it made in the original brief filed by appellant's counsel. It was mentioned in the reply brief, but in taking up and considering, point by point, the errors insisted upon in the principal argument, it was not reached.

It is urged upon us a second time that in the accounting appellant was wrongfully charged with the whole amount of interest received by him on the *Bohn* contract, when the charge, equitably, should have been reduced by the amount paid for interest on the $3,000 mortgage, which really represented the incumbrance on the property when *Beebe* obtained it from *Menz*. What was said in the former opinion as to the use of the property offsetting interest, had no reference to this, but to what occurred before the making of the *Bohn* contract. But there is no evidence in the record that *Beebe* paid any interest on the $3,000 after the date of the *Bohn* contract. If appellant had produced such proof, doubtless the credit would have been given. The attitude of counsel, it would seem, upon discovering the difficulty, should have been that of a suppliant for the favor of the court, to be allowed to remedy the mistake in failing to make proof of payment of the interest, not that of a demandant for the correction of an error in that the court below did not grant the credit to the appellant without any proof to base such credit upon. We cannot disturb the judg-

ment for error in not allowing appellant credit for interest, which, for aught that appears by the record, has not been paid.

The result is that the judgment and mandate heretofore entered in this court must be modified so as to read as follows: The judgment appealed from is modified by deducting therefrom $50.36, and is affirmed as modified. No change will be made in the judgment for costs heretofore taxed in this court, and no costs will be allowed on the motion for a rehearing, which motion must be denied.

By the Court.— It is so ordered.

STUBBINGS, Respondent, vs. O'CONNOR and others, Appellants.

February 2 — March 14, 1899.

(1) *Partnership: Dissolution by death of active partner: Continuance of business by administrators: Liability of dormant partner for losses.* (2) *Interest.*

1. The partnership relation existing between a dormant partner and the ostensible proprietor of a business, under an agreement treating the property as belonging to the latter and providing that he should repay the amount which the former had invested in the business, with interest and a share of the net profits, was dissolved by the death of the active partner, in whose possession all the partnership assets then were; and the business was thereafter carried on by his administrators in the name of the estate, with the knowledge and consent of the former dormant partner, who did not take possession or control as survivor or constitute said administrators his agents to continue the business. Afterwards said dormant partner brought suit to foreclose a mortgage which had been given to him by the active partner to secure the repayment of the amount invested by the dormant partner in the business. *Held*, that in such action the dormant partner was not chargeable with any part of the losses incurred in the business after the dissolution.

2. Where, pursuant to an option given him, the holder of a note has, before its maturity, declared the whole amount thereof to be due and payable, interest coupons subsequently maturing will not bear interest, in the absence of a clearly expressed written agreement to that effect.

APPEAL from a judgment of the circuit court for Oneida county: CHAS. M. WEBB, Judge. *Affirmed in part; reversed in part.*

For the appellants there was a brief by *Ryan, Hurley & Jones*, and oral argument by *T. C. Ryan.*

John Barnes, for the respondent.

CASSODAY, C. J. This is an action to foreclose a note and mortgage upon real estate given by John O'Connor, now deceased, and the defendant, *Ann O'Connor*, his wife, to the plaintiff, April 10, 1889. The following facts appear in the record, and are undisputed or found by the court:

Prior to August 8, 1888, the plaintiff (who then, and has ever since, resided at Chicago) owned a stock of goods at Marinesco, Michigan. John O'Connor entered into an agreement in writing, wherein and whereby the plaintiff agreed, in effect, to furnish to John O'Connor such sums of money as might be agreed upon between them, for the purpose of opening a general store at Eagle River, and he was to receive for the same interest thereon at ten per cent. per annum for the time such moneys were in the business, payable semi-annually. John O'Connor was to give security for all moneys so advanced. Interest was to be paid out of the business, and also the expenses of running the store, after which the profits were to be equally divided between the plaintiff and John O'Connor on the first day of January and July of each year. Thereupon the plaintiff's stock of goods at Marinesco was taken to Eagle River, where John O'Connor resided, and put into such general store at that place, in the name of John O'Connor, but, it would seem, without any agreement as to

the amount that the plaintiff should be allowed for such stock, except that the same should be put in at cost price; and so it happened that a controversy arose between the plaintiff and John O'Connor in respect to the amount to be allowed for such goods. During the winter of 1888–89 the plaintiff was engaged in logging operations in the vicinity of Eagle River, and his jobbers purchased at the store in Eagle River goods to an amount exceeding $5,000, the payment of which was guaranteed by the plaintiff. The plaintiff asserted that the prices charged him on account of the goods were unreasonably high, which John O'Connor denied; and the latter claimed that the price claimed by the plaintiff for the Marinesco stock was more than should be paid therefor. The matters in dispute were finally adjusted and settled by the parties thereto, without any fraud, concealment, or mistake having been practiced by or upon either of the parties; and it was further mutually agreed that the plaintiff should pay in full the accounts at the store which he had guaranteed, and that he should throw off $100 from the price claimed for the Marinesco stock, and that he should receive credit for such stock to the amount of $4,235.60 on account of the same, and which sum was the agreed value of the stock.

The parties had a full and fair settlement of their partnership transactions and dealings April 10, 1889, and it was found and agreed by them on that date that the plaintiff had made advances to John O'Connor for the purpose of carrying on the business, which, with interest thereon, together with the agreed value of the Marinesco stock and interest thereon, amounted in the aggregate to $19,576.43; that the accounts at the store so guaranteed by the plaintiff amounted in the aggregate to $5,085.63; and hence that the net balance invested by the plaintiff in the business amounted to $14,490.80. Upon such settlement the plaintiff and John O'Connor entered into an agreement in writ-

ing, dated April 10, 1889, and signed by them, respectively, wherein it was recited that John O'Connor was then, and for some time prior thereto had been, engaged in carrying on a general merchandise business in Eagle River, and that the plaintiff had theretofore loaned to him $14,611.50, which he therein agreed to allow to remain with John O'Connor for a period of five years from May 1, 1889; that therefore, and in consideration of the above, John O'Connor covenanted and agreed with the plaintiff to pay to him interest at ten per cent. per annum on $14,611.50, evidenced by a note of even date, and also one half of the net profits arising from the business conducted by John O'Connor,—the net profits to include all the proceeds arising from the business, after deducting all current expenses, including rent of store and clerk hire; that John O'Connor thereby agreed to keep a true and correct set of books, showing all the accounts and transactions of the business, which books should be open at all times for the inspection of the plaintiff; that such agreement should bind the parties thereto, their heirs and assigns; that during the term of five years the stock of goods in such business should not be sold out in bulk without the consent of both parties thereto.

On the same day, and as a part of the same transaction, John and *Ann O'Connor*, his wife, executed and delivered to the plaintiff their promissory note in writing, payable five years after date, for $14,611.56, with interest at ten per cent. per annum, and at the same time gave him five coupon notes, each for the amount of such annual interest, and due in one, two, three, four, and five years, respectively, for the purpose of securing the payment of the annual instalments of interest on the principal note as the same might become due. As collateral security for the payment of such six several notes, John O'Connor and wife made and executed the mortgage in question upon the real estate described. It was further stipulated and provided in and by

the notes and mortgage that in case default was made in the payment of such notes, or of any interest due thereon, or any part thereof, at the times specified therein, the whole amount of principal and interest thereon would become due and payable immediately, at the option of the plaintiff. The mortgage was duly recorded April 11, 1889. It was the purpose and intention of the parties that John O'Connor should assume all the partnership debts April 10, 1889, and become liable to the plaintiff for the entire amount of moneys furnished by him for the purpose of carrying on the business. The plaintiff did not furnish any money or means to carry on the business after April 10, 1889.

John O'Connor died July 4, 1889. Immediately after his death his widow and children opened the store and commenced to sell goods and carry on the trade in the usual manner. The care and conduct of the business were under the immediate supervision of his son *George E. O'Connor*, with the apparent knowledge and consent of the other heirs. Goods were bought for the continuance of the business, immediately after the death of John O'Connor, by *George*, in the name of the estate, and several of the heirs were employed in carrying on the business. The defendants *George* and *Ann O'Connor* applied for letters of administration of the estate, and were duly appointed as such administrators in September, 1889, and inventoried the stock and accounts due on account of the business as part of the estate; and thereafter the business was, with the knowledge and consent of the other heirs, carried on in the name of *George*, as administrator of the estate, by *George* and *Ann O'Connor*. George continued to sell the stock on hand at the death of his father, and to replenish it with other stock, and to use moneys received from real estate and rents, as administrator, for the purposes of carrying on the business, until September, 1891, when the business became hopelessly insolvent.

The plaintiff did not visit Eagle River, nor have any cor-

respondence relative to the business with the heirs, until July 31, 1889. He did not then or thereafter assert any claim to the property as surviving partner, and did not undertake to assume any control over the property. The plaintiff took no part in the management of the business, and exercised no control over the same, and made no advances for the purpose of carrying it on, after the death of John O'Connor. In the latter part of July, 1889, the plaintiff expressed to a son-in-law of John O'Connor, as his opinion, that it would be best for all concerned to continue the store business, and July 31, 1889, he had a conversation with *George* to the same effect, and thereafter the store business was so conducted and carried on with his knowledge and approval.

On July 17, 1890, the administrators paid on the notes and mortgage $1,000, to be credited upon interest due and payable at that date. On July 15, 1891, the plaintiff duly exercised his option to declare the whole sum secured by the notes and mortgage due and payable, and did declare the same due and payable, and duly served notice of such option upon the defendants herein.

This action was commenced August 28, 1891, against the administrators alone. On or about November 18, 1891, the summons and complaint were amended by adding the heirs at law of John O'Connor. On the same day the amended complaint and notice of *lis pendens* were, respectively, filed. On or about November 12, 1891, the administrators answered as such. After the summons and complaint were so amended, they answered the same as heirs at law. They answered, by way of counterclaims, some of the facts stated, including the agreements of August 8, 1888, and April 10, 1889, mentioned, and, among other things, that between August 8, 1888, and April 10, 1889, the plaintiff had put into the business $13,650.43, besides the Marinesco stock, and had drawn out, in goods, wares, and merchandise, at

cost prices, $5,085.83; that the Marinesco stock was put in at $4,145.60, whereas it was only of the value of $1,000; that April 10, 1889, it was agreed between John O'Connor and the plaintiff that the former should assume the entire debts of the firm to the plaintiff, and give his note and mortgage therefor, as stated; that the plaintiff claimed and falsely represented to John O'Connor the amount due to him from the firm, and the same were relied upon by him, and in that way the plaintiff procured the note and mortgage; that the plaintiff claimed for moneys advanced $1,084.54 too much; that he failed to deduct the $5,085.83 mentioned; that during the time the firm was engaged in business, its net losses amounted to $5,100, consisting in part in bad accounts, and the remainder in overcharges on the Marinesco stock, and other overcharges; that upon the death of John O'Connor, July 4, 1889, the plaintiff, as matter of law, became possessed of all the stock of goods, book accounts, moneys, and fixtures of the firm, as surviving partner thereof; that the firm assets at that time were $17,162.75, and the firm debts $3,352.53, and that the plaintiff, as such surviving partner, was bound to account for the balance of $13,810.22. The answer further alleged that *George* remained in the store as a mere clerk and agent of the plaintiff; that the plaintiff was also accountable for rent of the buildings at the rate of $60 per month. And the answer prayed that such several counterclaims and offsets be allowed against the plaintiff's note and mortgage.

The plaintiff replied to such counterclaims, and put the same in issue.

On the trial of such issues the court found, in addition to the facts stated, that through some error or oversight there was included in the notes and mortgage of April 10, 1889, $84.54 in excess of the amount actually found due from John O'Connor to the plaintiff in such settlement, and that that sum should be credited on the notes and mortgage as of

April 10, 1889; that the Marinesco stock was a second-hand stock, and was not adapted to the trade in Eagle River, and not worth to exceed $1,800; that the loss to the firm on such deal amounted to $2,435.60, and that the plaintiff was equitably chargeable with one half of such loss, amounting to $1,217.85, and that amount should be deducted from the note and mortgage as of April 10, 1889; that between April 10, 1889, and July 4, 1889, the plaintiff purchased goods out of the store to the amount and value of $688.85, and that sum, with interest thereon from July 4, 1889, was a valid counterclaim against the plaintiff; that neither *George* nor *Ann O'Connor* carried on the business, after the death of John O'Connor, as the agent of the plaintiff, and that the plaintiff did not carry on the business, either personally or through the instrumentality of agents, after such death; that the defendants have failed to prove or establish the allegations of any of the counterclaims set up in any of the answers interposed, except as so found; that the plaintiff was entitled to recover $100 solicitor's fees, as provided in the note, in addition to the taxable costs, which sum was found to be a reasonable amount.

And as conclusions of law the court found, in effect, that there should be deducted from the note and mortgage, as of April 10, 1889, the $84.54 mentioned, also the $1,217.80 mentioned, also $688.85 with interest thereon at six per cent. from July 4, 1889,— making in all $962.77; also, $1,000 paid July 17, 1890, to be credited as of that date; that, except as found, none of the counterclaims or defenses set up in the answers herein have been established for the purpose of defense, setoff, or counterclaim; that there was due and owing to the plaintiff on the notes and mortgage the principal sum of $13,309.22, with interest thereon from April 10, 1889, to February 20, 1896, at ten per cent., making for principal and interest $22,429.73; that there was due the plaintiff, for interest on the coupon notes given to secure

payment of interest the following amounts: On the note maturing April 10, 1890, $116.29; on the note maturing April 10, 1891, $387.50; on the note maturing April 10, 1892, $307.65; on the note maturing April 10, 1893, $227.80; on the note maturing April 10, 1894, $147.95,—making in all for interest on coupon notes $1,187.19, which, with the principal and interest, amounts to $23,616.92; that there was to be deducted from that amount the sum of $1,000 paid July 17, 1890, and $962.77 due from the plaintiff on the account to the defendants, leaving the net balance due to the plaintiff $21,654.15, over and above all payments, setoffs, and counterclaims, together with $100 solicitor's fees, and the taxable costs and disbursements of this action. The usual judgment of foreclosure and sale was ordered to be entered thereon.

From the judgment entered thereon accordingly, and the whole thereof, the defendants bring this appeal.

This court was required to construe the agreements of August 8, 1888, and April 10, 1889, in *Spaulding v. Stubbings*, 86 Wis. 255. It was there held that *Wilson H. Stubbings*—the plaintiff in this action—and John O'Connor, deceased, were by virtue of such agreements copartners, not only as to creditors, but also as between themselves. Although such partner, yet, as the business was conducted wholly in the name of John O'Connor, *Stubbings* was what is known in law as a "secret" or "dormant" partner. *Benjamin v. Covert*, 47 Wis. 382, and cases there cited. As John O'Connor was the ostensible proprietor of the business, he was, as has been held by this court, a trustee of an express trust, within the meaning of the statute, to the extent that he might have sued upon a partnership demand of the firm without joining his dormant partner. R. S. 1878, sec. 2607; *Platt v. Iron Exch. Bank*, 83 Wis. 358.

Such were the relations of the two partners at the time of the death of John O'Connor. That death of itself dis-

solved the firm for all purposes. The reason is that a surviving partner is not to be bound by the acts of agents not of his own choosing, as the representatives of the deceased partner would be. This being the reason, it is equally applicable where the duration of the partnership is, by an agreement, for a fixed period, as it would be where the duration is indefinite. 2 Bates, Partnership, § 580, and cases there cited. Upon such death of John O'Connor, the plaintiff, as such surviving partner, was undoubtedly entitled to the possession of the assets of the firm for the purpose of paying the debts and settling the partnership business. *Shields v. Fuller*, 4 Wis. 102; *Roys v. Vilas*, 18 Wis. 169. But as such surviving partner he would have had no right to mix the assets of the firm with his own and continue the business the same as though there had been no such dissolution. *Jennings' Adm'rs v. Chandler*, 10 Wis. 21.

But here John O'Connor, as such ostensible proprietor, was in the actual possession of all the partnership assets up to the time of his death; and the plaintiff, as such surviving partner, did not take, nor assume to take, actual possession of any part of such assets. On the contrary, the plaintiff manifestly relied upon the notes of April 10, 1889, secured by mortgage upon real estate, for the repayment of the moneys so advanced by him, and interest, as agreed. In fact, the agreement between the plaintiff and John O'Connor, of the same date, treats the goods and merchandise, the *corpus* of the partnership assets, as the property of John O'Connor, and secures to the plaintiff only "the net profits arising from the . . . business," with certain restrictions on John O'Connor as to the manner of conducting the business and keeping the books, and providing that the stock should "not be sold out in bulk without the consent of both parties thereto." *Bartlett v. Jones*, 2 Strob. 471; *S. C.* 49 Am. Dec. 606; *Blanchard v. Coolidge*, 22 Pick. 155; *Howe v. Howe*, 99 Mass. 73.

In harmony with the spirit of that agreement, the widow and children of John O'Connor, immediately upon his death, opened the store, and continued the business in the name of the estate, under the supervision of *George E. O'Connor*, the same as before such death — bought new goods and mixed them with the old goods, and sold indiscriminatingly,— not only for years after the widow and *George* were appointed administrators of the estate, but during the few weeks intervening between such death and such appointment; and from July 31, 1889, such business was so conducted with the knowledge and consent of the plaintiff. Under the repeated rulings of this court, it is very manifest that upon the death of John O'Connor, intestate, his right, title, and interest in the property and business in question did not descend to his heirs, but became vested in his administrators, immediately upon their appointment; and such vesting related back to the time of such death. *Melms v. Pfister*, 59 Wis. 192, and cases there cited; *Miller v. Tracy*, 86 Wis. 333; *Meyer v. Garthwaite*, 92 Wis. 575; *Hall v. Hall*, 98 Wis. 199. The result is that the widow and heirs at law, as such, had no legal right to the property. Their continuance of the business and the purchase and sale of goods, as mentioned, can only be justified under the authority of *George* and his mother as administrators. There is no pretense that they ever entered into any contract of partnership with the plaintiff. There is no ground for holding that upon the death of John O'Connor the plaintiff continued or assumed to continue the business for a day or at all,— much less that the defendants, or any of them, ever acted as the agent or agents of the plaintiff in conducting such business. We must hold that after the death of John O'Connor the business was conducted by the administrators alone for the benefit of the estate. The views thus expressed dispose of a number of questions urged by the defendants.

The court allowed two claims of the defendants, reducing

the amount of the note and mortgage at the time they were given to $13,309.22. Of course, that reduced the amount of each of the five coupon notes correspondingly. The court allowed the counterclaim for goods sold and delivered to the plaintiff prior to the death of John O'Connor, with interest, which amounted at the time of making the findings to $962.77. The court also allowed the payment of $1,000 made July 17, 1890, to be applied on the first coupon note as of that date, and also allowed $116.29 as accrued interest on that note, and also allowed $387.50 as accrued interest on the coupon note falling due April 10, 1891. Those two coupon notes fell due prior to July 15, 1891, when the plaintiff exercised his option and declared the whole amount secured by the notes and mortgages as due and payable. By virtue of declaring such option the whole amount became due and payable; and we perceive no rule of law authorizing interest upon interest which subsequently matured, and which, according to the findings, amounted at that time, in the aggregate, to $683.40. The statute declares that, in the computation of interest upon any note, "interest shall not be compounded, nor shall the interest thereon be construed to bear interest, unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith." R. S. 1878, sec. 1689. This court has gone so far as to hold that interest coupons attached to a note or bond bear interest, upon default in payment when due. *Mills v. Jefferson*, 20 Wis. 50; *Cleveland v. Burnham*, 64 Wis. 361; *Nash v. Meggett*, 89 Wis. 493, 494. We certainly cannot extend the rule thus announced. The contract is very exacting and oppressive. While parties must be allowed to make their own contracts so long as they are made understandingly and not in violation of law, yet there is no reason in the case at bar for allowing interest not specifically provided for in the contract.

By the Court.— That portion of the judgment of the circuit court allowing such excess of $683.40 is reversed, and the

judgment in all other respects is affirmed. No costs are allowed to either party, except that the appellants must pay the fees of the clerk of this court.

102	364
f104	536
102	364
L112	[4]502
112	[4]503
102	364
114	[5]168
114	[1]505
102	364
115	[6]324
115	[7]498

BUTLER, Plaintiff in error, vs. THE STATE, Defendant in error.

February 4 — March 14, 1899.

Appeal and error: Abandonment of assignment of error: Criminal law and practice: Statement of offense in complaint: Selection of jurors: Evidence: Insanity: Reasonable doubt: Instructions to jury: Immaterial errors.

1. An assignment of error not argued will be treated as abandoned unless it presents a palpable and obvious error prejudicial to justice.
2. A complaint made before a justice of the peace, which alleges in the language of the statute that the defendant did wilfully, feloniously, and with malice aforethought kill and murder a certain person, is sufficient to give the justice jurisdiction upon the preliminary examination.
3. The statute providing for the selection of names of jurors by jury commissioners is not invalid because it curtails the right which supervisors formerly had to furnish a jury list.
4. On the trial of an issue as to the sanity of a person charged with murder the admission of a physician's testimony that cuts on the body of the victim appeared to have been made by a sharp instrument and that death occurred from a fracture of the skull and hemorrhage, was not prejudicial to defendant, where those facts were wholly undisputed throughout the case.
5. An instruction that insanity, to constitute a defense, must be such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or not conscious, at the time, of the nature of the act which he is committing, or such a complete destruction, other than voluntary, of his will that his actions are not subject to it but are beyond his control, is *held* to state correctly the rule of law most favorable to defendant.
6. An instruction in a criminal case that a reasonable doubt is a doubt for which a reason can be given based on the evidence in the case, is correct.
7. An instruction defining a reasonable doubt as being, among other things, "such a doubt as would govern and control a reasonably

prudent man, and deter him from acting or deciding in his own most important affairs and concerns of life," is not erroneous.

8. A mistake, in charging the jury that a reasonable doubt is one which, after a consideration of all the evidence in the case, "leaves the minds of the jury in that condition that they *can* say that they feel an abiding conviction, to a moral certainty, of the truth of the charge,"—using the word "can" instead of "cannot,"—is *held* not to have been a material error, where it is evident from the circumstances and the remainder of the charge that the jury could not have been misled thereby.

9. An instruction that, if there is one single material fact in the case proved to the satisfaction of the jury by a preponderance of the evidence which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt and justify an acquittal, is not erroneous as tending to imply that unless some substantive fact is proved by the preponderance of the evidence it will not raise a reasonable doubt, where full and accurate instructions were given as to the persistency of the presumption of innocence, the propriety of the most charitable and merciful construction of the facts, and the necessity that every reasonable doubt should be removed before conviction would be justified.

ERROR to review a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

D. J. Hemlock, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *R. F. Hamilton*, second assistant attorney general.

DODGE, J. The plaintiff in error, on December 20, 1897, was convicted of murder in the first degree for the killing of his wife on the 5th of July in that year. There was no dispute as to the fact that he slew her with two or more blows of an ax. He was tried upon a preliminary issue of insanity, and, being found sane, was then tried upon the issue of his guilt, and from judgment and sentence upon conviction brings this writ of error.

Twenty-two assignments of error are presented in plaintiff in error's brief, more than half of which are not argued, either orally or in the brief; and we shall assume from that

fact that they are abandoned, and shall not consider them. This court ordinarily will not assume the labor of searching for grounds to support assignments of error which counsel deem unworthy of argument, though we should not, for that reason, ignore an assignment which presented a palpable and obvious error prejudicial to justice.

1. It is claimed that the complaint before the justice, upon which the preliminary examination was had, was insufficient. It alleges, in the language of the statute, that the plaintiff in error "did wilfully, feloniously, and with malice aforethought kill and murder one Mary Butler." This is sufficient in a complaint before a justice, where only a substantial statement of some offense is necessary to give the justice jurisdiction. R. S. 1878, sec. 4776; *State ex rel. De Puy v. Evans*, 88 Wis. 260; *Annis v. People*, 13 Mich. 511. Indeed, in *Allen v. State*, 85 Wis. 22, such allegation was held sufficient, in an information, to support a verdict of murder in either the first, second, or third degree.

2. The fifth assignment protests against the present jury law, providing for selection of names by jury commissioners. No ground is pointed out except that it curtails the right of supervisors of the different towns to furnish a jury list. That right, when it existed, was purely statutory, and could, of course, be withdrawn in the discretion of the legislature.

3. The sixth assignment complains that, upon the trial of the issue of insanity, a physician was allowed to testify that the cuts upon the body of the victim appeared to be made by a sharp instrument, and that death occurred from a fracture of the skull and hemorrhage. These facts were so wholly undisputed throughout the case that the testimony could not have been prejudicial to the defendant at any stage of the case.

4. Under the sixteenth assignment plaintiff in error assails that portion of the court's charge on the question of sanity in which the jury were instructed that insanity means "such a perverted and deranged condition of the mental and moral

faculties as to render a person incapable of distinguishing between right and wrong, or not conscious, at the time, of the nature of the act which he is committing." Apparently the only criticism made by the plaintiff in error is that insanity, to constitute a defense, may also consist in the loss or subordination of the will, so that, although the moral character of the act may be understood, the conduct of the accused is beyond his control.

There are many respectable authorities to support even that portion of the charge of which plaintiff in error complains, if it stood alone. 4 Am. & Eng. Ency. of Law, 715; *State v. Erb*, 74 Mo. 199. But it is unnecessary to pass on that question, for the court's charge did include both classes of insanity, and did fully instruct the jury that the loss by disease of either the *cognitive* or the *conative* power was sufcient to constitute a defense. The words above quoted were immediately followed by: "Or where, though conscious of it, and able to distinguish between right and wrong, and knowing that the act is wrong, yet his will, by which is meant the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control." The charge as given, therefore, seems to be a correct statement of the rule of law most favorable to defendant, and in full accord with that applied in *Guiteau's Case*, 10 Fed. Rep. 161, by Judge Cox, whose charge in that famous case deservedly occupies a high place in judicial literature for thoroughness of investigation and accuracy of expression.

5. The fifteenth, twentieth, twenty-first, and twenty-second assignments of error present certain criticisms upon the court's charge as to reasonable doubt. That charge was given twice,—first upon the submission of the question of insanity, and again upon the submission of the question of guilt, to the jury. The portion excepted to was as follows: "A reasonable doubt is that state of the case which, after

an entire comparison and consideration of all the evidence in the case, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the matter. But it is not necessary that you should be satisfied beyond all possibility or suspicion of a doubt of the truth of the matter. Doubts that are not based upon a careful and reasonable consideration of all the testimony, facts, and circumstances proved upon the trial, and are purely imaginary, or born of sympathy alone, or of the ingenious suggestion of counsel, not based on the evidence in the case, should not influence your verdict. Possible or sympathetic doubts have no proper place in your deliberations. A reasonable doubt is a doubt founded upon a consideration of all the testimony, facts, and circumstances proved on the trial, and based on reason; a doubt for which a reason can be given, based on the evidence in the case; and such a doubt as would govern and control a reasonably prudent man, and deter him from acting or deciding in his own most important affairs and concerns of life. But you should give the facts proven in the case the most reasonable, charitable, and merciful construction consistent with all the evidence in the case. And if there is one single material fact in the case proved to your satisfaction by a preponderance of the evidence in the case, or the greater weight of the evidence, which is inconsistent with the guilt of the defendant as to any of the degrees of crime submitted to you for your determination in this case, this is sufficient to raise a reasonable doubt as to the guilt of the defendant as to the degree of crime to which such material fact is connecting him and part of,—in such case the jury should acquit the defendant as to such degree of crime where any such doubt exists."

The particular complaints suggested by plaintiff in error will be considered in their order:

(*a*) Plaintiff in error attacks the expression that a reason-

able doubt is "a doubt for which a reason can be given, based on the evidence in the case." It is unnecessary again so soon to go at any length into the question of proper instruction from court to jury of the somewhat abstruse distinctions involved in the expression "reasonable doubt." In the very recent case of *Emery v. State*, 101 Wis. 627, the subject is fully discussed. In that case the entire equivalent of the phrase here objected to was used, viz.: "If there arise in your mind a doubt for which a good reason arising from the evidence can be given, it is your duty to give the defendants the fullest and amplest benefit of that, and acquit them." This was held free from error in that case, and we adhere to that view. The phrase assailed is not an incorrect method of stating the distinction between that measure of uncertainty which justifies an acquittal and the mere fanciful, unfounded, speculative doubt which can always be raised, even as to the existence of facts most obvious to our senses. A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given.

(*b*) Error is assigned upon the following definition: "Such a doubt as would govern and control a reasonably prudent man, and deter him from acting or deciding in *his own* most important affairs and concerns of life." The criticism here made is one which has been fully discussed by this court; last in the case of *Emery v. State*, 92 Wis. 146, 152, and earlier in *Anderson v. State*, 41 Wis. 430. In the *Anderson Case*, an instruction which gave to the jury as a guide "that prudence and reason which govern you in the *ordinary conduct of your affairs*" was held inadequate, and the rule stated that they should bring to their duty "the reason and prudence which they would exercise in *the most* important affairs of life." In the *Emery Case* the defect was the omission of the word "most," the guide given the jury being such care "as would lead a careful and prudent man to act affirmatively *in important matters of his own*." The only vari-

ance of the charge in this case from the rule declared in *Anderson v. State* is the substitution of the word "his" for the word "the." It is unfortunate, when definite language has been prescribed as exactly expressing a rule, that such language should not be adhered to, and that even the slightest variation therefrom should give justification for debate as to the sufficiency of the words used. We reiterate what was said by Mr. Justice WINSLOW in *Emery v. State, supra:* "A juryman in a criminal case must use all the reason, prudence, and judgment which a man would exercise in the most important affairs of life, and an instruction authorizing the use of any less degree of reason, prudence, and judgment is erroneous." It seems to us, however, hypercritical to contend that the substitution of "his most important" for "the most important" has the effect to authorize that forbidden "less degree" of reason and prudence. It cannot be doubted that "the most important affairs" in which an individual is to exercise judgment and precaution are those which are most important to himself. Whether their importance to others or to the public at large may be the greatest is not the consideration which affects his own judgment. The words used in the instruction complained of are, for the purpose of guiding the jury, equivalent to those prescribed by *Anderson v. State*, and did not authorize any relaxation of the vigilant prudence required in reaching their judgment. *Bradley v. State*, 31 Ind. 494, 504.

(*c*) The portion of the charge here assigned as error is as follows: "A reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence in the case, leaves the minds of the jurors in that condition that they *can* say that they feel an abiding conviction, to a moral certainty, of the truth of the charge. But it is not necessary that you should be satisfied beyond all suspicion of a doubt that the defendant is guilty before you can convict." This is obvious confusion and absurdity. An

examination of the rest of the record convinces us that, while a correct quotation from the bill of exceptions, the appearance there of the instruction in this form is due to a mere clerical mistake in transcribing the words in fact used by the court. An examination of the charge upon the issue of insanity shows that the subject of reasonable doubt was there treated verbatim as in the charge upon the issue of guilt. The charge must have been written in order to secure this identity in words, and we have no doubt that in such charge as so written by the court and delivered to the jury the words were "that they cannot say" instead of "that they can say." The foregoing remarks are made in justice to the circuit judge, whose well-known care and erudition are inconsistent with so obvious a blunder as is here presented. Treating the objection, however, as if the mistake had in fact been made, we are satisfied that the jury could not have been misled thereby. The persistency with which the court insisted throughout the charge on the efficiency of a reasonable doubt as to any of the issues to defeat a conviction, the utter inconsistency of the final sentence of this very quotation with the idea that the reasonable doubt was to work against the accused instead of in his favor, and the fact that to this same jury "reasonable doubt" had been correctly defined in an earlier stage of the trial by the use of exactly the same phraseology without the omission of this negative word, convinces us that to any ordinarily intelligent mind the true meaning must have been apparent, even if the word "not" had been omitted. It is true that in the case of *Revoir v. State*, 82 Wis. 295, the charge that insanity must be proved beyond a reasonable doubt was held reversible error; but the considerations there involved are very different from those here. Insanity is an affirmative defense, and laymen may well be uncertain as to whether the duty is not upon the defendant who asserts it to bear the burden of establishing it. Indeed, it has been a vexed question in courts, and,

while the great weight of authority is with the holding of this court that, when sanity becomes an issue, it must be established by the prosecution like every other fact, yet even judicial minds have differed thereon, and the direct instruction to the nonprofessional jury that the burden lay on the accused to prove insanity might well have been understood according to its terms. It is not possible, however, that any man of ordinary intelligence, in the light of the rest of this charge, could have understood that conviction instead of acquittal must follow if a reasonable doubt existed. The very extravagance of the proposition renders it innocuous.

(*d*) Error is predicated upon the instruction: "If there is one single material fact in the case proved to your satisfaction by a preponderance of the evidence, . . . this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant."

The expression here criticised is not a fortunate one. While, of course, it is strictly accurate, yet, standing alone, it is possible that it might convey to the minds of jurymen the converse implication,—that, unless some substantive fact were proved by the preponderance of the evidence, it would not raise a reasonable doubt. But we cannot say in this case, and in the light of the very full and accurate instructions given to the jury as to the persistency of the presumption of innocence, the propriety of the most charitable and merciful construction of the facts, and the necessity that every reasonable doubt should be removed before conviction would be justified, that it could have misled them. If counsel for the accused deemed this instruction, strictly correct in itself, to be misleading, or to suggest by implication a wrong rule, he could have requested such additional instruction as would have obviated any such effect. True, the supreme court of Iowa has considered a charge substantially like this sufficiently misleading in its implications to justify a reversal, but we have not before us the remainder of the charge in

that case, nor the peculiar issues which were presented, both of which are material considerations as to the effect or significance of such a charge. *State v. Judiesch*, 96 Iowa, 249.

On the other hand, in *State v. Roberts*, 15 Oreg. 187, the refusal of a request by the accused for the giving of substantially this instruction was affirmed because it was too favorable to the accused.

We have carefully examined the record in this case, and find nothing therein to throw any doubt upon the care, impartiality, and fairness of the trial, nor upon the correctness of the conclusion reached in the court below, whereby, as we are convinced, even-handed justice was administered.

By the Court.—Judgment affirmed.

LANE and others, Executors, Appellants, vs. FRAWLEY, Respondent.

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f106 560
d106 642
102 373
111 [4]194
102 373
116 [2]509

February 21—March 14, 1899.

Action, tort or contract? Deceit: Survival: Statutes construed.

1. In an action by executors, a complaint alleging that defendant had made false representations whereby plaintiffs' decedent in her lifetime had been induced to execute a mortgage to defendant, which, through foreclosure by an assignee, resulted in the loss of the property, for the value of which, together with the amount of a deficiency judgment paid by plaintiffs, judgment is demanded, is *held* not to state a cause of action on implied contract, but, if any, one in tort for deceit.
2. An action in tort for deceit, to recover general damages caused by the fraud, does not survive under sec. 4253, R. S. 1878, which provides for survival of "actions for damages done to real and personal estate." That language relates only to injuries to specific property.
3. Nor does such an action survive under sec. 3252, R. S. 1878, which provides that "for wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer, an action may be brought by the executors or admin-

istrators of the person injured, after his death, against such wrongdoer." That section was not intended to provide for the survival of any action, but merely to regulate the proceedings in such actions as otherwise survive.

APPEAL from an order of the circuit court for Eau Claire county: W. F. BAILEY, Circuit Judge. *Affirmed.*

This was an appeal from order sustaining demurrer to a complaint which alleged that plaintiffs were executors under the will of Mary Allen, deceased; that in her lifetime the defendant falsely and fraudulently represented to the deceased, substantially, that if she would execute and deliver to him a note and mortgage for $1,300, he would take proceedings to recover back certain lands formerly owned by her deceased husband, for the executors of his estate; that the law required that before taking proceedings he should be paid his fee, otherwise the case would be thrown out of court; that a note and mortgage for attorney's fees could not be assigned, and that he would attach to the mortgage a written agreement, specifying what he was to perform, to be placed upon the records with the mortgage; that the false statements were made by the defendant wilfully and fraudulently, knowing them to be false, and for the purpose of deceiving said Mary Allen and inducing her to execute said note and mortgage, which she did in reliance thereon; that said representations were false, and that the defendant did not carry out any of said false and fraudulent promises, but did assign the said mortgage, which was thereafter foreclosed, and the property sold; and that, by reason of the false and fraudulent representations so made as aforesaid, the estate of said Mary Allen has suffered the loss of the real estate mortgaged, to its damage in the sum of $2,500, and by reason of the payment of a deficiency judgment said estate has been damaged in the further sum of $177.01. Judgment was accordingly demanded for $2,677.01. The demurrer was general.

Appellants contend that the complaint may be construed to state a cause of action in *assumpsit*, but, if not, that the action for deceit survives to the executors.

For the appellants the cause was submitted on the brief of *Vesper Morgan*. To the point that the cause of action survived, he cited sec. 3252, S. & B. Ann. Stats.; *Haight v. Hayt*, 19 N. Y. 464; *Cregin v. Brooklyn C. T. R. Co.* 75 N. Y. 192; *Hegerich v. Keddie*, 99 N. Y. 258; *Randall v. N. W. Tel. Co.* 54 Wis. 140; *Baker v. Crandall*, 78 Mo. 584, 47 Am. Rep. 126; Pomeroy, Remedies (2d ed.), § 147.

For the respondent there was a brief by *Frawley, Bundy & Wilcox*, and oral argument by *C. T. Bundy*.

DODGE, J. That the complaint attempts to state an action *ex delicto* seems too plain for discussion. The allegations, in brief, are that defendant made false representations whereby deceased, in her lifetime, was induced to execute a mortgage of $1,300, which, being foreclosed by others than the defendant, resulted in the loss of the mortgaged property of value $2,500, whereby she suffered damage in that sum. On the other hand, the complaint contains no allegations sufficient to constitute a cause of action in contract. In many cases in this court the allegation of the *wrongful* obtaining or withholding of money from the plaintiff has been held not inconsistent with a contract character of the action; but in every such case that character has been saved by the fact that the remedy prayed was that to which an implied contract entitled the plaintiff, namely, repayment of the money actually received or retained by the defendant. Among these cases, to some of which appellants call our attention, is *Van Oss v. Synon*, 85 Wis. 661. There the court, by ORTON, J., says: "In actions at law the demand for judgment is vastly important in determining the nature of the action, as between tort and contract, or as between trover and money had and received." In *Fifield v. Sweeney*, 62

Wis. 204, the action was held to be in contract, for the reason that the prayer for relief was simply that to which the implied contract entitled the plaintiff. In that case the money was alleged to have been obtained by fraud and deceit, but the court says: "The whole complaint goes upon the implied *assumpsit* to repay the money so had and received, and interest thereon, and no other damage by reason of the fraud or mistake is claimed."

Such considerations are wholly wanting here. The prayer is not for the recovery of that which the defendant has obtained from the plaintiff by the alleged misrepresentation, but the damage which she has suffered by reason of his fraud, obviously far exceeding the amount received by him, which amount is not set forth. Again, the complaint is obviously not framed upon, and not sufficient to support, an action *ex contractu* for breach of the alleged promises of defendant to perform certain services for plaintiff. Her recovery for such breach would be for what she suffered by the failure to receive those services, as to which no allegation whatever is made, and which bear no relation to the damages set forth and sought to be recovered.

This, then, being a tort action for deceit to recover general damages caused by the fraud, and not to recover back specific property obtained by fraud, it is vigorously debated whether or not it survives. The question is squarely answered in the negative by this court in *John V. Farwell Co. v. Wolf*, 96 Wis. 10, wherein it is pointed out that our statute for the survival of actions, namely, sec. 4253, R. S. 1878, is confined, so far as it relates to this subject, to "actions for damages done to real and personal estates;" that such statute is taken from Massachusetts, by way of Michigan, in both of which it received a restrictive construction, such as to exclude such torts as this, and a construction which wholly differentiated it from the New York statute, which provided for the survival of "actions for all wrongs done to

property rights or interests of another." In that case it was said (citing *Reed v. Hatch*, 19 Pick. 47) that our statute is confined to *injuries to specific property*, and that a mere fraud or cheat by which a pecuniary loss is sustained is not such,— while the New York statute extends to injury to property rights and interests, whereby actions for deceit or other fraud diminishing the estate are included. *John V. Farwell Co. v. Wolf* went upon the assumption that the question of survival of actions is regulated and controlled in this state entirely by sec. 4253, and that, except for its provisions, no actions survive save such as did so at the common law.

We are urged now to recede from the conclusion reached in *John V. Farwell Co. v. Wolf*, and to find authority for the survival of such an action as this in sec. 3252, R. S. 1878, which provides that "for wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer, an action may be brought by the executors or administrators of the person injured after his death against such wrongdoer, and, after his death, against his executors or administrators." It is true that the expression, "wrongs done to the property, rights or interests," is the same as that used in the New York statute of survival, which there has been held broad enough to include injuries to mere property rights, as distinguished from injury to property itself. The question, however, is as to the scope of sec. 3252,— whether it is to be treated as a survival statute, and as additional to and independent of sec. 4253. Such condition of things would be almost an anomaly in careful statute-making. Sec. 4253 is apparently exhaustive of the subject, and occurs in a chapter under the title of "Survival of Actions," and has so appeared continuously since the revision of 1849, during all of which time sec. 3252, with some modifications immaterial now, has existed under a chapter entitled "Actions and Proceedings by and against Executors," etc. Such classification of these two sections would seem to

be significant. In designating what actions should survive, the legislature would naturally locate the section on that subject in the chapter with reference to survival of actions, and would not ordinarily place it under the title of "Proceedings against Executors;" and the appearance of sec. 3252 under such title at once suggests that its purpose is not to provide what actions for wrongs shall survive, but to provide as to how the actions which do survive may be prosecuted,—whether by executors, by next of kin, or by heirs. Such a construction would be not at all unusual, as applied to somewhat analogous statutory provisions. Thus, in *Noonan v. Orton*, 34 Wis. 259, in discussing the provision in the bankrupt law that the assignee might prosecute and defend in his own name "all suits to which the bankrupt is a party," this court decided that, in view of its purpose, its general language was to be construed to apply, not to "all suits," but only to those based on rights of action which passed to him by virtue of other provisions. Again, in *Slauson v. Schwabacher Bros. & Co.* 4 Wash. 783, the court held that a section providing that "*all other causes of action* by one person against another, whether arising on contract or otherwise, survive to the personal representatives," was not effective to give survival to any cause of action, but was intended merely to regulate the manner of prosecuting such actions as otherwise survived. In *La Pointe v. O'Malley*, 47 Wis. 332, 339, this court held that sec. 2801, which provides that "in case of a transfer of interest, or devolution of liability, the action may be continued by or against the original party," did not *confer* any right of survival or assignment, but merely regulated procedure in such actions as by virtue of other provisions of law survived or were assignable. Many other instances might be found where general language has been limited by reason of the presumed legislative purpose to thereby regulate rights otherwise existing, rather than to grant other and additional rights.

This construction, by which the grant of survival of actions is made exclusively by sec. 4253, and only regulation of proceedings in such as do survive is attempted by sec. 3252, is in accordance with all the precedents and practice in this state. Nowhere, in the fifty years of existence of these two statutes, has it been held, or indeed intimated, that any action survived by virtue of sec. 3252, while it has been repeatedly said, albeit sometimes *obiter* and sometimes only inferentially, that sec. 4253 is exclusive upon this subject. In *Woodward v. C. & N. W. R. Co.* 23 Wis. 400, the court, by DIXON, C. J., said: "The common-law rule must govern, unless it [the action] has been taken out of that rule by some express provision of statute. We know of no such provision. The statute declaring what actions shall survive in addition *to those which survive by* the common law, is section 2 of chapter 135 of the Revised Statutes [now sec. 4253]; and this is clearly not one of them. . . . The provisions of statutes allowing actions of tort to survive are strictly construed, so as not to extend the exceptions beyond the clear intent of the legislature." While it is true that sec. 3252 was not expressly cited in the original briefs in that case, it was urged that the cause of action survived because it was an injury to *the property rights*, as distinguished from an injury to the property, of the deceased, a contention which could find support only from that section; and in a motion for a rehearing the predecessor of sec. 3252 was strenuously pressed upon the court as justifying the survival. That motion, however, was overruled without comment, thus impliedly denying to that statute force to enlarge the list of surviving actions beyond the limitations of sec. 4253.

In *Noonan v. Orton*, 34 Wis. 259, the court again treated chapter 135 (sec. 4253) as the exclusive statute of survival, and said: "In this state the list of actions which survive is materially enlarged by statute (R. S. ch. 135). But in this

list we fail to find enumerated actions for malicious prosecution or malicious abuse of legal process." That was an action by the assignee in bankruptcy for the diminution of the bankrupt's estate as a result of malicious abuse of legal process, which might apparently well have been supported by the application of the so-called New York rule, if sec. 3252 be given the construction contended for by appellants. In that case the court cites with approval *In re Crockett*, 2 N. B. R. [75] 208, in which it is held that an action for deceit in recommending an employee, by reason whereof the loss of a large amount of property was suffered, was an action of personal tort for fraud and deceit, and did not survive nor pass to the assignee. In *Randall v. N. W. Tel. Co.* 54 Wis. 140, sec. 4253 is referred to generally as the only statute giving any survival to a tort cause of action.

In *Farrall v. Shea*, 66 Wis. 561, 565, which was an action of ejectment, both sections 3252 and 4253, and some other sections, were vigorously pressed upon the court as authorizing survival. The court (ORTON, J.) said: "Our statute on this subject (sec. 4253, R. S. 1878) is very strict and clear, leaving nothing to intendment beyond what is expressed in it. [Quotes section.] This is very explicit. When the legislature provided that actions for the recovery of *personal* property should survive, it would have been easy and highly proper to have added 'or real property.' . . . There is no other statute which can be tortured into any such amendment of the common law." He then proceeds to declare the rule of strict construction, and that the expression in that section of certain actions excludes all others.

In *Cotter v. Plumer*, 72 Wis. 476, which was an action for trespass for cutting timber, brought against the administrator of the trespasser, the court held that but for sec. 4253 the death of the trespasser would have terminated the action and the right of action as well; that by virtue of that section and sec. 4254 both the action and the right, to the

extent of actual or compensatory damages, are saved. It is apparent that, if sec. 3252 also grants survival of action, that right would have existed unrestrained by sec. 4254, and punitory damages as well might have been recovered. It does not appear that sec. 3252 was called to the attention of the court, however. *Murray v. Buell*, 76 Wis. 657, was an action for loss and damage resulting from a conspiracy to the injury of plaintiff's business. The court held that such cause of action did not survive, either by virtue of sec. 4253, R. S. 1878, nor by virtue of ch. 280, Laws of 1887, which added actions for assault and battery, false imprisonment, or other damage to the person, and therefore did not survive at all. That action is in all respects analogous to the action of deceit, resulting in loss and damage. Sec. 3252 does not appear to have been pressed upon the attention of the court.

John V. Farwell Co. v. Wolf, 96 Wis. 10, as we have said, again declares sec. 4253 to be the statute measuring the survival of actions, and denies the claim made in that case that an injury such as this could survive by virtue of the New York authorities. An examination of the briefs in this case shows that neither sec. 3252 nor sec. 4253 was specifically called to the attention of the court, but that it was contended that actions for injuries to property rights, as distinguished from the property itself, survive; and it cannot be said, from examination either of the briefs or of the opinion, that both of these sections were not before the court and duly considered in reaching its decision.

In *Schmidt v. Menasha W. W. Co.* 99 Wis. 300, both sections 3252 and 4253 were pressed upon the court as authorizing the survival of the widow's right to damages for her husband's death; but the survival was denied by the court on the authority of *Woodward v. C. & N. W. R. Co.* 23 Wis. 400, the court declining to consider the language of sec. 3252 and impliedly treating it as giving no rights of survival, the

whole discussion being addressed to the language of sec. 4253.

Thus, it appears that through a period of fifty years, with the subject more or less directly presented to the court in some ten or twelve vigorously contested cases, there has been no departure from the view that sec. 4253 is the statute which accords the quality of survival to actions not surviving at common law, and that sec. 3252 accords no such right. During this period the entire body of the statutes has been twice carefully revised, with no change in the arrangement or language of these sections to indicate legislative disapproval of the view taken by the court. Several times those sections have been verbally amended to enlarge the scope of one or the other, but never so as to intimate that the view taken by the court as early as 1868, in *Woodward v. C. & N. W. R. Co.*, and frequently followed since, was not in accord with the legislative purpose. Whatever might be our view, as an original question, of the relation between these two sections, it would be subversive of the whole doctrine of *stare decisis*, by which both property rights and litigation must be guided, to now depart from the position so persistently maintained, whether always definitely expressed or not, and to hold that any action for a wrong done to property rights or interests of another shall survive, even though it do not come within the language of sec. 4253. We feel constrained to hold, as we think the court has repeatedly held before, that sec. 4253 is exclusive upon the subject, and that an action of deceit to recover pecuniary damages not to specific property does not survive the death of the party injured, and, as a result, that the complaint in this case states no cause of action.

By the Court.— Order sustaining demurrer is affirmed.

DOWLING, Respondent, vs. THE FIRE ASSOCIATION OF PHILADELPHIA, Garnishee, Appellant.

SAME, Respondent, vs. THE LANCASHIRE INSURANCE COMPANY, Garnishee, Appellant.

SAME, Respondent, vs. THE FARMERS FIRE INSURANCE COMPANY, Garnishee, Appellant.

REID, MURDOCK & Co., Respondent, vs. THE FIRE ASSOCIATION OF PHILADELPHIA, Garnishee, Appellant.

SAME, Respondent, vs. THE FARMERS FIRE INSURANCE COMPANY, Garnishee, Appellant.

ROBERTSON, Respondent, vs. THE FIRE ASSOCIATION OF PHILADELPHIA, Garnishee, Appellant.

SAME, Respondent, vs. THE FARMERS FIRE INSURANCE COMPANY, Garnishee, Appellant.

CONRAD, Respondent, vs. THE FIRE ASSOCIATION OF PHILADELPHIA, Garnishee, Appellant.

February 21 — March 14, 1899.

Garnishment: Costs: Discretion.

1. A garnishee who denies liability and, upon trial of the issue, is successful, is entitled to recover costs of the plaintiff under sec. 2772, R. S. 1878, providing that, in case of a trial between plaintiff and garnishee, if the plaintiff do not recover more than the garnishee admitted by his answer, the latter shall recover costs.
2. Where in such a case the garnishee is entitled to costs the court has no discretion to limit the amount thereof to a fixed sum, but they should be taxed and allowed as prescribed by the general statute (sec. 2921, R. S. 1878).

APPEALS from judgments of the circuit court for Eau Claire county: W. F. BAILEY, Circuit Judge. *Reversed.*

These cases were reported by the judge of the Seventeenth circuit as involving legal questions of such doubt and difficulty as to warrant consideration and decision by this court. The facts involved in each case are substantially the same,

except as herein stated. The several plaintiffs were creditors of Thomas F. Dowling. Actions were commenced, and the insurance companies summoned as garnishees. Each answered, denying liability. Issue was taken upon such answers. There was no formal consolidation of the actions, but, the issues being similar, the court directed that the several actions having the same plaintiff should be tried together, which was done, and a joint judgment in favor of such plaintiff and against the garnishees was rendered. Upon appeal these judgments were reversed, on the ground that the actions were prematurely brought and that the liability of the garnishees was contingent and not absolute. *Dowling v. Lancashire Ins. Co.* 89 Wis. 96. Stipulations were made by the attorneys in each action that the same should be dismissed with costs. Judgments were duly entered pursuant thereto, and costs were taxed, each garnishee being allowed only its proportionate share of the costs and disbursements incurred on the trial, besides such as were taxable for services separately performed. Plaintiffs moved to retax costs. In the three *Ann Dowling* cases the court reduced the costs from $256.51 to $104.96, not by disallowing items improperly included, nor by reducing separate items because in excess of the amount allowed by statute, but on the ground that the actions were equitable and the court had the power, in discretion, to reduce the amount to such sum as would seem fair and just. In each of the other cases the court reduced the amount from $48.72 to $8.35, basing its action on the same ground as in the other cases. The question certified is whether the action of the court was valid or invalid.

For the appellants there were briefs by *Doolittle & Shoemaker*, and oral argument by *L. A. Doolittle.*

For the respondents there were briefs by *Geo. C. & Fred A. Teall*, and oral argument by *Fred A. Teall.* They contended, *inter alia*, that it was an equitable action. *Delaney*

v. Hartwig, 91 Wis. 412. The matter of costs rested in the discretion of the court. *Massing v. Ames*, 38 Wis. 285; *Gilman v. Vaughan*, 44 Wis. 646; *Marsh v. Bellew*, 45 Wis. 36; *Spruhen v. Stout*, 52 Wis. 517; *Hill v. Durand*, 58 Wis. 160; *Carrier v. Atwood*, 58 Wis. 301; *Portz v. Schantz*, 70 Wis. 497; *Lego v. Medley*, 79 Wis. 211; *Shawano Co. Bank v. Koeppen*, 78 Wis. 533.

BARDEEN, J. The question certified by the circuit judge could easily have been answered by him, had he referred to the statute governing costs in garnishee actions, and the decisions of this court. Sec. 2772, R. S. 1878, provides: "In case of a trial of an issue between the plaintiff and any garnishee, costs shall be awarded to the plaintiff and against the garnishee, in addition to his liability, if the plaintiff recover more than the garnishee admitted by his answer; and if he do not, the garnishee shall recover costs of the plaintiff. In all other cases, under this chapter, not expressly provided for, the court may award costs in favor of or against any party, in its discretion." In these cases the garnishees denied liability. The plaintiffs took issue upon this answer and were defeated. The garnishees were put to the trouble and expense of a trial, and we see no reason why, under the terms of the statute, they should not be entitled to their costs. In *Baker v. Lancashire Ins. Co.* 52 Wis. 193, it was argued that the last clause of the statute quoted places the whole matter of costs in the discretion of the court, but the chief justice, in answering this contention, said: "But we agree with the plaintiff's counsel that this construction is not to be adopted, but that the court's discretion in allowing costs is subject to, and controlled by, other statutory provisions."

It being established that the garnishees were entitled to their costs, we are led to the inquiry whether the court had any discretion as to the amount that should be allowed.

Sec. 2921, R. S. 1878, provides that when costs are allowed they shall be as therein prescribed. Subd. 7, sec. 2918, says that in all equitable actions costs may be allowed, or not, to any party, in the discretion of the court. In construing this provision in *In re Carroll's Will*, 53 Wis. 228, this court said: "This discretion seems to be limited to allowing or disallowing to a party such costs as the other provisions of the statute prescribe, and not to be a discretion to fix an arbitrary amount, according to the trial judge's notion of justice and equity in the particular case." This construction was followed in *Hayes v. Douglas Co.* 92 Wis. 429, where it was said: "It was error to limit the amount of costs to be recovered to $30. The court had exhausted its powers over the matter of costs when it had determined that the plaintiff should recover them. The law determines the amount."

Referring to *T. T. Haydock C. Co. v. Pier*, 78 Wis. 579, we find it stated that in actions of this kind costs are not limited to $25, under sec. 2921, R. S. 1878, because they are not actions at law on contract. It follows, therefore, that the action of the circuit court was without warrant of law, and cannot be sustained.

By the Court.— The judgment in each of these several actions is reversed, and the cases are remanded with directions to enter judgments in favor of the garnishees for costs as originally taxed.

THE FARMERS FIRE INSURANCE COMPANY, Plaintiff in error, vs. CONRAD and another, Defendants in error.

February 21 — March 14, 1899.

Writ of error: Garnishment: At law or in equity?

1. A writ of error will lie only after judgment in an action at law, and cannot be used to review judgments in equitable actions.
2. A proceeding by garnishment to reach nonleviable property or assets is essentially equitable.

ERROR to review a judgment of the circuit court for Eau Claire county: W. F. BAILEY, Circuit Judge. *Writ dismissed.*

W. S. Conrad commenced an action in the circuit court for Eau Claire county against *Thomas F. Dowling*, and summoned the plaintiff in error as garnishee. The latter had insured property belonging to *Dowling*, which had been destroyed by fire, and *Conrad* was seeking to secure payment of a debt due him from *Dowling* by the garnishment proceedings. The garnishee answered, denying liability. Issue thereon was taken, but it was finally determined that the garnishee was not liable, and a stipulation was made that the proceedings should be dismissed with costs. Judgment of dismissal was duly entered, and costs taxed at $48.72. Upon a motion to review such retaxation, the court disallowed all items for taxable costs, and allowed judgment to stand for $8.35 disbursements. The garnishee seeks to review the action of the circuit court by this writ of error.

For the plaintiff in error there was a brief by *Doolittle & Shoemaker*, and oral argument by *L. A. Doolittle.*

For the defendants in error there was a brief by *Geo. C. & Fred A. Teall*, and oral argument by *Fred A. Teall.*

BARDEEN, J. Sec. 21, art. I, of the constitution provides that "writs of error shall never be prohibited by law." In

Buttrick v. Roy, 72 Wis. 164, it was said that this constitutional provision renders the writ inviolate, and preserves it to the citizen as it existed when the constitution was adopted. *Jackson v. State*, 92 Wis. 422, is to the same effect. There is, however, no constitutional provision or statutory enactment enlarging its scope or increasing its functions. It lay then, as it only lies now, after judgment in any action at law in a court of record, to correct some supposed mistake in the proceedings or judgment of the court. It was never granted to review a judgment in an equitable action. *Delaplaine v. Madison*, 7 Wis. 407; *Howes v. Buckingham*, 13 Wis. 442; *Shannon v. State*, 18 Wis. 604; *Costello v. Buch*, 25 Wis. 477; *Crocker v. State*, 60 Wis. 553. Sec. 3043, Stats. 1898, provides that writs of error may issue to review final judgments in actions triable by jury, except actions for divorce. Thus, it will be seen, both by statute and decision, that a writ of error will only lie after judgment in an action at law, and cannot be used to review judgments in equitable actions. Therefore, if it be determined that this is an equitable action, the writ of error must be dismissed. This question has been raised in this court in several cases, and decided, so that it becomes unnecessary to discuss it at this time. In *La Crosse Nat. Bank v. Wilson*, 74 Wis. 391, the conclusion arrived at is that a proceeding by garnishment to reach nonleviable property or assets formerly reached by a creditors' bill is essentially equitable, and the issues therein are triable by the court. *Delaney v. Hartwig*, 91 Wis. 412, holds the same doctrine. And see *T. T. Haydock C. Co. v. Pier*, 78 Wis. 579. There can be no doubt but that *Conrad* was seeking to secure what is termed "nonleviable assets" in the hands of the plaintiff in error. This marked the proceeding as distinctly equitable in its nature, and hence the judgment entered therein cannot be reviewed in this court by writ of error. While no formal motion to dismiss the writ has been

made, it being apparent that the writ was improvidently issued, the court feels bound to decline to hear the case on its merits, and to dismiss the writ.

By the Court.— So ordered.

MEINHOLD, Respondent, vs. WALTERS and others, imp., Appellants.

February 22 — March 14, 1899.

Public lands: Homestead entry: Mortgage prior to patent.

A mortgage given by one who has entered land as a homestead under the federal statutes and has received the final receiver's receipt or certificate is valid as against the mortgagor and those claiming under him, even though given prior to the issue of the patent, if given and received in good faith.

APPEAL from a judgment of the circuit court for Clark county: W. F. BAILEY, Circuit Judge. *Affirmed.*

For the appellants the cause was submitted on the brief of *Chas. F. Grow* and *J. R. Sturdevant & Son.* They contended, *inter alia,* that the mortgage was void as against public policy. *Herbert v. Brown,* 65 Fed. Rep. 2; *Anderson v. Carkins,* 135 U. S. 483; *Carley v. Gitchell,* 105 Mich. 38. A mortgage is a conveyance of an interest in lands. *Rowell v. Williams,* 54 Wis. 636; *Mason v. Beach,* 55 Wis. 607.

For the respondent there was a brief by *McCausland & Smith,* and oral argument by *E. F. McCausland.* As to the validity of the mortgage they cited *Spiess v. Neuberg,* 71 Wis. 279; *Paige v. Peters,* 70 Wis. 178; *Wis. Cent. R. Co. v. Price Co.* 64 Wis. 579; *Fuller v. Hunt,* 48 Iowa, 163; *Nycum v. McAllister,* 33 Iowa, 374; *Orr v. Stewart,* 67 Cal. 275; *Kirkaldie v. Larrabee,* 31 Cal. 455; *Christy v. Dana,* 34 Cal. 548, 554; *S. C.* 42 Cal. 179; *Stewart v. Powers,* 98 Cal. 514;

Camp v. Grider, 62 Cal. 20; *Whitney v. Buckman*, 13 Cal. 536; *Tartar v. Hall*, 3 Cal. 263; *Lang v. Morey*, 40 Minn. 396; *Jones v. Tainter*, 15 Minn. 512; *Norris v. Heald*, 12 Mont. 282; *Wilcox v. John*, 21 Colo. 367; *Robbins v. Bunn*, 54 Ill. 48; *Skinner v. Reynick*, 10 Neb. 323; *Jones v. Yoakam*, 5 Neb. 265; *Cheney v. White*, 5 Neb. 261; *Larson v. Weisbecker*, 1 Land Dec. Dept. Int. 422; *Appeal of Roy*, 6 id. 340; *Haling v. Eddy*, 9 id. 337; *Young v. Arnold*, 5 id. 701; *William H. Ray*, 6 id. 340; *Mudgett v. D. & S. C. R. Co.* 8 id. 243; *Alonzo W. Graves*, 11 id. 283; *Murdock v. Ferguson*, 13 id. 198; *Wright v. Shumway*, 1 Biss. 23; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 361; *Cornelius v. Kessel*, 128 U. S. 456, 460; *Wis. Cent. R. Co. v. Price Co.* 133 U. S. 496; *Myers v. Croft*, 13 Wall. 291; *French's Lessee v. Spencer*, 21 How. 228; *Thredgill v. Pintard*, 12 How. 24; *Landes v. Brant*, 10 How. 348; *Hughes v. U. S.* 4 Wall. 232.

CASSODAY, C. J. This is an appeal from a judgment of foreclosure and sale in an action commenced April 13, 1895, to foreclose a mortgage bearing date September 8, 1873, executed by A. W. Raymond and wife to J. C. Gwin & Co., to secure $800, and which mortgage was assigned to the plaintiff October 10, 1874. Issue being joined and trial had, the parties stipulated the facts or the court found them to be, in effect, that May 18, 1869, one A. W. Raymond, the mortgagor, made application to enter the lands described as a homestead, pursuant to the acts of Congress then in force; that March 6, 1871, he made, executed, and delivered to one Stafford a quitclaim deed of all the pine timber on the lands described, and that deed was recorded March 7, 1871; that March 27, 1873, the final receiver's certificate or receipt was issued to A. W. Raymond for such lands, and such receipt was recorded October 23, 1873; that March 22, 1875, such certificate or receipt was set aside and declared void by the commissioner of the general land office of

the United States; that April 27, 1875, another receiver's certificate or final receipt was issued to him in lieu of the one so set aside, and the same was duly recorded May 10, 1875; that May 7, 1875, the mortgagor and wife, for a valuable consideration, conveyed a part of the lands described to J. C. Gwin & Co., by warranty deed, which was duly recorded May 10, 1875; that May 7, 1875, that firm conveyed the pine timber on another part of the land described to Huntzicker by quitclaim deed, which was recorded June 2, 1875; that the members of the firm and their wives also conveyed the lands, excepting the pine timber, to Huntzicker, by warranty deed, May 29, 1875, which was duly recorded, June 2, 1875; that July 30, 1875, a patent was issued by the United States to A. W. Raymond, covering the lands described; that subsequently the defendants, respectively, acquired some right, title, or interest in such lands or some portion thereof, so as to be properly made defendants herein; that there is no evidence that J. C. Gwin & Co. or the plaintiff had any knowledge of the execution and delivery of the quitclaim deed of March 6, 1871; that, at the time the mortgage was executed and delivered, J. C. Gwin & Co. had no knowledge of any infirmity or alleged infirmity in the title to the lands described; that, at the time the mortgage was assigned, the plaintiff herein had no knowledge of any infirmity in the title; that J. C. Gwin & Co. took the mortgage in good faith and for a valuable consideration; that the plaintiff was a purchaser for a valuable consideration, in good faith, of the note and mortgage; that A. W. Raymond was enlisted in the service of the United States as a soldier of the war of the Rebellion between 1861 and 1865; that all of the allegations of the complaint and reply are true; that all of the allegations of the answers and counterclaim are untrue; that there was due at the date of the findings $1,455.78; also $50 as solicitor's fee, which was therein determined to be a reasonable fee in such a case.

As conclusions of law the court found, in effect, that the plaintiff was entitled to the usual judgment of foreclosure and sale; and from the judgment entered thereon accordingly three of the defendants appeal.

The only question presented in this case is whether the mortgage is valid as against the mortgagor and those claiming under him, or void because it was executed prior to the time when the mortgagor obtained his patent. The question must be resolved according to the federal statutes as construed by the supreme court of the United States. *Paige v. Peters*, 70 Wis. 182; *Wis. Cent. R. Co. v. Wis. River L. Co.* 71 Wis. 99; *Whitney v. Detroit L. Co.* 78 Wis. 246; *Miller v. Donahue*, 96 Wis. 508. Such statutes required the person making such homestead entry, after the expiration of five years from the time of making such entry, to make proof that he had resided upon or cultivated the premises for the term of five years immediately succeeding the time of filing the affidavit of such entry, and also to make an affidavit that no part of such land had been alienated, except as therein provided. R. S. of U. S. sec. 2291. The exception thus mentioned relates to transfers for church, cemetery, school, or railroad purposes. R. S. of U. S. sec. 2288. Such statutes also provide, in effect, that no lands acquired for such homestead should "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." R. S. of U. S. sec. 2296.

This court has held that one who has placed machinery upon land which the purchaser of the machinery has entered as a homestead, but for which he has obtained no patent, cannot enforce a lien upon the land for the payment of the machinery. *Paige v. Peters*, 70 Wis. 178. Subsequently, this court held that a person having made such homestead entry might give a valid mortgage thereon prior to obtaining his patent. *Spiess v. Neuberg*, 71 Wis. 279. In reaching such conclusion, this court followed the prior adjudica-

tions of the supreme court of the United States upon the subject there cited. In one of these adjudications it was said not to have been the purpose of Congress to make the lands themselves inalienable until the patent should be granted, and in another it was expressly held that, "unless forbidden by some positive law, contracts made by actual settlers on the public lands concerning their possessory rights, and concerning the title to be acquired in future from the United States, are valid as between the parties to the contract, though there be at the time no act of Congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title." 71 Wis. 286, citing *Lamb v. Davenport*, 18 Wall. 307.

It is contended that such cases have since been practically overruled by the supreme court of the United States. In the case particularly relied upon it was held that "a contract by a homesteader to convey a portion of the tract when he shall acquire title from the United States is against public policy and void; and it cannot be enforced, although a valuable consideration may have passed to the homesteader from the other party." *Anderson v. Carkins*, 135 U. S. 483. That was an action for specific performance of a contract entered into prior to the entry of the land, and hence, in our judgment, has no application to the case at bar. In a quite recent case it has been held by that court that "in holding that, as between the United States and a homestead settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, the court is not to be understood as expressing an opinion whether, as between the settler and the state, it may not be deemed to be the property of the settler, and therefore subject to taxation." *Shiver v. U. S.* 159 U. S. 492. In a still more recent case it is held that, "as between the government and the settler, the title to public land, until the conditions of the law are fulfilled, remains in the United States,

but in the meantime, if the settler is engaged in improving the land as required by law, and disposes of any surplus timber without intent to defraud the government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the government, the sale is lawful, and the purchaser is protected." *Stone v. U. S.* 167 U. S. 178. The receiver's receipt was sufficient *prima facie* proof of the homestead entry in the land office. *Whittaker v. Pendola*, 78 Cal. 296. In the case at bar, the "final receiver's receipt" or certificate was obtained more than five months prior to the execution of the mortgage, and although that receipt or certificate was set aside by the commissioner March 22, 1875, yet another was issued in lieu of it April 27, 1875, and about three months afterwards a patent was issued thereon to the man who executed the mortgage. The court found that the mortgage was given and received in good faith, and such findings appear to be supported by the record.

By the Court.—The judgment of the circuit court is affirmed.

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102 394
115 *406

DAVIS, Receiver, Appellant, vs. THE PIONEER FURNITURE COMPANY, Respondent.

February 22—March 14, 1899.

Fire insurance: Premium notes: Defenses of maker: Breaches of conditions: Use of prohibited article necessary in business: Unconditional and sole ownership.

1. In an action upon a premium note given in consideration of a policy of insurance, the insured cannot defeat a recovery on the ground that conditions in the policy respecting the ownership of the premises and the use of benzine thereon had been broken, unless the breaches would have defeated a recovery on the policy in case of loss.

2. A policy insuring buildings as a furniture factory, though containing a condition avoiding it in case benzine be kept, used, or allowed on the premises, is not vitiated by such keeping and use of benzine on the premises as is customary and necessary in manufacturing furniture.

3. The owner of an estate in fee upon condition subsequent was in possession with no condition broken, and there had also been deposited in escrow an absolute deed in fee simple to be delivered upon performance of the condition. *Held*, that he was the sole and unconditional owner of the property within the meaning of a condition in a policy of insurance avoiding it in case the insured was not the sole and unconditional owner.

APPEAL from a judgment of the circuit court for Eau Claire county: W. F. BAILEY, Circuit Judge. *Reversed.*

The plaintiff sued, as receiver of the Oshkosh Mutual Fire Insurance Company, to recover on a premium note given by the defendant July 1, 1889. The defendant answered, alleging, in substance, that the note was void on account of a provision in the policy that the policy should be void if the defendant was not the sole and unconditional owner of property, or if there were kept, used, or allowed on the premises certain explosives, including benzine; that both of these conditions had been broken; and that the premium note was therefore without consideration.

It appeared on the trial that the insured buildings were a large furniture factory, and that the defendant's title at the time of the issuance of the policy consisted of a conditional deed, dated January 6, 1888, the conditions being that the defendant was to erect a furniture factory of a certain size, and to operate the same continuously for five years, with a certain number of workmen, or to pay the grantor $10,000, and, in case of default of both of these conditions, the property to revert to the grantor. An absolute deed was executed at the same time and placed in escrow under a written contract providing for its delivery at the end of five years in case all the conditions under the other deed were complied

with. This absolute deed was afterwards delivered, in August, 1893. The plaintiff was appointed receiver of the insurance company in November, 1889. At all times during the continuance of the policy the defendant kept benzine on the premises for use in the manufacture of furniture.

At the close of the evidence the court, being of the opinion that the case only presented questions of law, directed a verdict for the plaintiff, subject to the opinion of the court, and afterwards, being of the opinion that the undisputed facts entitled the defendant to judgment, set aside the verdict and rendered judgment for the defendant.

For the appellant there was a brief by *Barbers & Beglinger*, and oral argument by *Fred Beglinger*. They contended, *inter alia*, that only the insurer could take advantage of the alleged forfeitures. *Miner v. Phœnix Ins. Co.* 27 Wis. 693; *Webster v. Phœnix Ins. Co.* 36 Wis. 67; *Viele v. Germania F. Ins. Co.* 26 Iowa, 9; *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108; *Appleton I. Co. v. British Am. Ass. Co.* 46 Wis. 33; *Cannon v. Home Ins. Co.* 53 Wis. 585; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410; *Renier v. Dwelling House Ins. Co.* 74 Wis. 89; *Rasmusen v. N. Y. L. Ins. Co.* 91 Wis. 81; *Schultz v. Caledonian Ins. Co.* 94 Wis. 42; *Osterloh v. New Denmark M. H. F. Ins. Co.* 60 Wis. 126; *Bourgeois v. Mut. F. Ins. Co.* 86 Wis. 402. The printed part of the policy in this case must give way to that which is written, because the two are in conflict. *Hall v. Ins. Co. of N. A.* 58 N. Y. 292; *Harper v. Albany M. Ins. Co.* 17 N. Y. 194; *Bryant v. Poughkeepsie M. Ins. Co.* 17 N. Y. 200; *Harper v. N. Y. C. Ins. Co.* 22 N. Y. 441; *Steinbach v. La Fayette F. Ins. Co.* 54 N. Y. 90; *Pindar v. Kings Co. F. Ins. Co.* 36 N. Y. 648; *Wall v. Howard Ins. Co.* 14 Barb. 383; *Moore v. Protection Ins. Co.* 29 Me. 97; *Niagara F. Ins. Co. v. DeGraff*, 12 Mich. 124; *Stout v. Commercial U. Ass. Co.* 11 Biss. 309; *Whitmarsh v. Conway F. Ins. Co.* 16 Gray, 359; *Archer v. Merchants' & M. Ins. Co.* 43 Mo. 434; *Citizens'*

Ins. Co. v. McLaughlin, 53 Pa. St. 485; *Girard F. & M. Ins. Co. v. Stephenson*, 37 Pa. St. 293.

For the respondent there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*. They contended, *inter alia*, that the title of the insured was such that he could not have recovered in case of loss. *Gettelman v. Commercial U. Ass. Co.* 97 Wis. 237; *Wilcox v. Continental Ins. Co.* 85 Wis. 193; *McFetridge v. Phenix Ins. Co.* 84 Wis. 200; *Waller v. Northern Ass. Co.* 2 McCrary, 637; *Davis v. Iowa S. Ins. Co.* 67 Iowa, 494; *Dwelling House Ins. Co. v. Raynolds*, 41 Ill. App. 427; *Clay F. & M. Ins. Co. v. Huron S. & L. M. Co.* 31 Mich. 346; *McCormick v. Springfield F. & M. Ins. Co.* 66 Cal. 361; *Cuthbertson v. N. C. H. Ins. Co.* 96 N. C. 480; *Wineland v. Security Ins. Co.* 53 Md. 276.

WINSLOW, J. If the defendant, in case of fire, could have recovered upon the policy of insurance, notwithstanding the use of benzine upon the premises and notwithstanding the condition of the title, then the defense to the note must fail.

As to the use of benzine upon the premises, there can be little doubt that the policy was not vitiated thereby. The property was a large furniture factory, known to be such, insured as such, and expected to be used as such. The evidence shows that there were a few barrels of benzine kept on the premises at all times; that it was used in finishing the furniture manufactured on the premises. There is nothing to show that any more was kept than was reasonably necessary to operate properly a factory of this capacity. In the case of *Faust v. Am. F. Ins. Co.* 91 Wis. 158, it was held that where a contract of insurance, by the written portion, covers property to be used in conducting a particular business, the keeping of an article necessarily used in such business will not avoid the policy, even though expressly prohibited in the printed conditions of the policy. That was a case where benzine

was kept for use in a furniture repair shop, and it was shown to be customarily and necessarily used in such business.

In the present case the burden was on the defendant to show that a condition of things existed which avoided the policy. This burden was not discharged by showing that benzine was used on the premises in manufacturing furniture in the usual and ordinary way, because the policy contemplated the manufacture of furniture and the use of such materials as are customarily used for such purpose; but it must further be shown that it was kept in unnecessarily large quantities, or for purposes not contemplated by the policy. Neither of these facts appears in the present case, and hence no breach of the condition was shown.

The defendant's title was an estate in fee upon condition subsequent. It was in possession with no condition broken, and if it performed the prescribed conditions as to operation of the factory for five years, or in lieu thereof paid the grantor $10,000 in money, then its conditional fee became a fee simple; but, if it failed in both particulars, the title reverted to the grantor. Furthermore, an absolute deed in fee simple of the property, running to the defendant, was held by the Chippewa Valley Bank, in escrow, under a written, sealed agreement, by the terms of which the same was to be delivered to the defendant upon performance of the conditions named in the first deed. The question is whether this constitutes an "unconditional and sole ownership," within the meaning of the policy. In *Johannes v. Standard Fire Office*, 70 Wis. 196, a person in possession of land under a contract of purchase, who was not in default, but had only paid part of the purchase money, was held to be the sole, equitable owner; and it was held that his title was sole and unconditional for all purposes of insurance. If such ownership satisfies the condition as to unconditional and sole ownership, it is difficult to see why the defendant's title here did not satisfy the condition. In addition to its deed

upon condition subsequent, it had, in effect, a land contract with the original owner, entitling it to an absolute deed in fee upon performance of the conditions or payment of $10,000; thus fulfilling all the conditions present in the *Johannes Case.* Furthermore, it appears on the face of the policy and of the application that the defendant's title was in some way made security for the performance of the conditions of a contract to employ a certain amount of labor for five years. It is true that it is stated that the contract is secured by a conditional mortgage on the property, and that this is not a correct description of the security; but the fact important for the insurer to know is that the defendant's title is in some effective way pledged or bound for the performance of the labor contract, and of that fact the insurer had knowledge, though the knowledge was inaccurate as to the exact form which the security took. Under these circumstances, we think the insurance company could not have defended against a claim for loss under the policy on the ground that defendant did not have the sole and unconditional ownership.

These are the only contentions made by the answer which are insisted on in this court; and it follows that judgment should have been rendered for the plaintiff upon the verdict. This case presented no material disputed questions of fact, but only questions of law; hence it was a proper case for the rendition of a verdict subject to the opinion of the court. Stats. 1898, sec. 2857. In such a case the only question is which party is entitled to final judgment upon the uncontroverted facts, without regard to the verdict. *Durant v. Abendroth*, 69 N. Y. 148. The court below should have directed judgment for the plaintiff.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the plaintiff for the amount demanded in the complaint.

102 400
106 150

ELLIS, Respondent, vs. SOUTHWESTERN LAND COMPANY, imp., Appellant.

February 22 — March 14, 1899.

Equity: Reformation of deed: Mistake: Laches: Trusts and trustees: Adverse possession.

1. Mere delay, short of the statutory period of limitation, in bringing an action to reform a deed does not preclude the granting of such relief, where the action is brought soon after the discovery of the mistake on which it is based, and it does not appear that the other party has been prejudiced by the delay.
2. The possession of land by a trustee is the possession of the *cestui que trust* and will not, however long continued, ripen into title in the trustee.
3. By mistake the land in question, the title to which was held in trust, was conveyed by the trustee with other lands to a corporation of which he was president and manager, conducting its business and his own as if they were one. When he afterwards withdrew from the corporation he conveyed to it all his property of every kind in consideration of its assuming certain indebtedness. Thereafter the corporation delivered to him a lease of the land in question which had been executed by it as lessor, with intent to relinquish any claim to the property. The mistake had not then been discovered, and both parties supposed the legal title to this land was still in the trustee. *Held*, in an action by the *cestui que trust* to correct the mistake by reformation of the original deed to the corporation, that the latter was not entitled, as a condition of a recovery, to have the *cestui que trust* pay to it the sum, if any, which he owed the trustee on account of the land.

APPEAL from a judgment of the circuit court for Eau Claire county: W. F. BAILEY, Circuit Judge. *Affirmed.*

Action to reform a deed of real estate and recover possession of lands alleged to have been, by mistake, included therein and recover the rents and profits received by the grantee. The complaint stated facts sufficient to constitute a cause of action of the character indicated. The material facts were put in issue by the answer. In support of the

complaint the evidence established without controversy, or tended to establish, the following facts:

Plaintiff, at the time of the trial, was an old man about eighty years of age. He was uneducated, a farmer by occupation, and had resided on a farm some sixteen miles from the city of Eau Claire for forty years. Defendant J. F. Ellis was a lawyer, real-estate dealer, and loan agent, doing business as such in the city of Eau Claire, and had been so engaged since prior to 1876. He did most of his father's business during most of the time mentioned, and took title to himself of considerable real estate, which he and his father testified on the trial belonged to the latter. In 1876 an agreement was entered into, partly by the father and partly by the son in the father's behalf, to purchase of a Mrs. Cook the property in question in this case, which agreement was consummated by the son conveying to Mrs. Cook eighty acres of land the title of which was in his name but which was considered the property of the father, and by Mrs. Cook conveying the property in question to defendant Ellis subject to a mortgage of $600. There was an agreement between the father and son that the latter should pay off the mortgage and reimburse himself therefor out of the income of the property, and the title was taken from Mrs. Cook pursuant to that agreement. The title to the property remained in the name of defendant Ellis till February 10, 1887, during which time it yielded a considerable income each year, all of which was received by said Ellis.

In 1885 defendant Ellis had considerable real estate, which he had accumulated in the course of his real-estate business, and he employed one Allen to assist him in conducting his business, agreeing to give Allen a one-third interest in the property for five years' services. Thereafter, up to February 10, 1887, Allen worked for Ellis, during which time the property in question was handled in the office, the taxes paid thereon and rents collected, the same as

on other real estate the title to which was in the name of Ellis, but there was some talk between Ellis and Allen, during that period, indicating that the property in question belonged to plaintiff. About February 10, 1887, an agreement was made between defendant Ellis and Allen, to the effect that the business that they were conducting, and the property in such business, should be put into a corporation and the stock taken by the two, except such as might be necessary to enable them to complete the corporate organization. The defendant *Southwestern Land Company* was organized accordingly, defendant Ellis subscribing for two thirds and Allen for one third of the stock. To complete the scheme, intending to convey to the corporation the real estate which had been acquired in the real-estate business as aforesaid, and in which Allen was entitled to an interest, Ellis made a deed of the same to the corporation, the consideration named in the deed being $18,000. The real estate in question was conveyed by such deed.

Defendant Ellis, from the time of the organization of the corporation till he sold out in 1893, as hereinafter mentioned, was its president, treasurer, and one of its board of directors, and controlled its business and handled all the property owned by the corporation, very much the same as before the conveyance heretofore mentioned was made. All the income from the business, and the income from business conducted by Ellis outside the corporation, went into a common fund, which was deposited in Ellis's name. Out of that fund Ellis took money as he needed it, and all of the expenses of the corporation, including taxes upon its lands, were paid out of it by Ellis's personal checks. The business of the corporation was so conducted that it and J. F. Ellis were practically one. When the deed was made to the corporation it was pursuant to an offer made by J. F. Ellis to J. F. Ellis as president of the corporation. The whole affair was handled by him on both sides in making the agreement and in consum-

mating it by the conveyance to the corporation. The income from the property in question was collected, sometimes by Ellis and sometimes by Allen, and uniformly went into the common fund in the hands of Ellis. Some written leases were made of the property, all of which were made by the corporation as lessor. The property was twice mortgaged by Ellis and his wife to secure his individual debts while the title was in the corporation, Allen on one of the occasions knowing the facts and as notary taking the acknowledgment of the mortgage.

In September, 1893, Ellis severed his connection with the corporation and conveyed to it all his property of every name and nature in consideration of the corporation agreeing to pay certain indebtedness for which he was liable. Thereafter, up to March, 1894, Ellis remained in the office of the corporation as before, and the corporation continued to collect the rent on the property in question. In March aforesaid, Ellis vacated the office of the corporation, about which time Allen, as manager, handed to Ellis the lease of the disputed property. The circumstances attending the delivery of the lease to Ellis were controverted on the evidence. Ellis testified that Allen handed him the lease, stating that the property did not belong to the corporation. Allen said that the lease was delivered to Mr. Ellis as the result of a determination by the corporation to make some provision for Mrs. Ellis, who was his sister; that such determination was to turn the property over to Mrs. Ellis, and that he so stated to the defendant Ellis at the time the lease was delivered. He testified, however, that at the time of such delivery Ellis stated that the property belonged to his father. For a year or two after the lease was delivered as aforesaid Ellis collected the rent, and during the same time twice renewed the lease in the name of J. F. Ellis, agent, as lessor. After the rent had been collected by Ellis as stated, the officers of the corporation, becoming offended because of

Ellis's conduct in stimulating litigation against it, repudiated their determination to allow Mrs. Ellis to have the property, and demanded of the tenant in possession to attorn to the corporation, which was done. This action was soon thereafter commenced, plaintiff claiming that he did not know till about the time of such commencement that the title to the property was in the corporation.

Defendant Ellis testified on the trial that he was ignorant of the condition of the title till shortly before the action was commenced, that it was never intended by him to convey the property to the corporation, and that he did not know that it was included in the conveyance. The court found the facts in accordance with the foregoing, and that the property, from the time it was purchased from Mrs. Cook in 1876, was in fact the property of the plaintiff, but was held in trust by the defendant Ellis to secure him for advances made to pay off the $600 mortgage; that the advances therefor had been returned to Ellis out of the income of the property, and that plaintiff was entitled, as against defendant Ellis, to a conveyance of the property to him; that the property was conveyed to the corporation by mistake and that such mistake was not discovered till shortly before this action was commenced; that the corporation received and retained the following income from the property: August 1, 1891, to April 1, 1893, $181; April 1, 1893, to April 1, 1895, $95; November 1, 1895, to March 22, 1897, $124. The evidence showed that the corporation paid the taxes of 1896 at $19.25. Whether this amount was credited to the corporation in the accounting does not definitely appear.

Judgment was awarded according to the prayer of the complaint, for a conveyance of the property to plaintiff; also for a recovery by plaintiff of the corporation of $404 as income received by it, with interest on such amount from the time received, according to the findings. Judgment was entered accordingly.

For the appellant there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*. They contended, *inter alia*, that the laches of plaintiff was conclusive against his right to recover. *Sable v. Maloney*, 48 Wis. 33; *Sheldon v. Rockwell*, 9 Wis. 158; *Kobiter v. Albrecht*, 82 Wis. 58; *Holden v. Meadows*, 31 Wis. 284; *Combs v. Scott*, 76 Wis. 662; 22 Am. & Eng. Ency. of Law, 1043; *Hammond v. Hopkins*, 143 U. S. 224; *Willard v. Wood*, 164 U. S. 502; *Galliher v. Cadwell*, 145 U. S. 368; *Penn M. L. Ins. Co. v. Austin*, 168 U. S. 685. The alleged agreement between father and son was void under the statute of frauds and under the statute of uses and trusts. *Skinner v. James*, 69 Wis. 605; *Gallagher v. Gallagher*, 89 Wis. 461; *Campbell v. Campbell*, 70 Wis. 311; *Krouskop v. Krouskop*, 95 Wis. 296; *Caprez v. Trover*, 96 Ill. 456; *Stephenson v. Thompson*, 13 Ill. 186; *Dickinson v. Davis*, 80 Am. Dec. 202.

Frederick A. Teall, for the respondent.

MARSHALL, J. The assignments of error go mainly to whether the findings of fact are contrary to the clear preponderance of the evidence. We do not deem it advisable to discuss the evidence at any great length for the purpose of supporting the conclusions at which we have arrived. It may be admitted that the situation of plaintiff in regard to the title to the property in question is in many respects inconsistent with the claim that it belonged to him and was conveyed to the son J. F. Ellis to secure the latter for advances made to discharge incumbrances thereon to the amount of $600; but the facts in that regard are supported by the direct and positive evidence of the two Ellises, being all the direct evidence on the subject, and we are unable to say that the trial court's decision as to where the truth lies is wrong. The same may be said as to all the facts requisite to sustain the judgment. Starting with the fact that the property was that of the plaintiff, the subsequent occur-

rences as found by the court below are all reasonable when viewed in the light of attending circumstances, and are in accord with the direct evidence of the two Ellises, and in many respects of Allen, who testified on behalf of the defendant, and in fact all the direct evidence in the case.

On the question of mistake it appears that the property which J. F. Ellis intended to put into the corporation, and which Allen supposed was to be put in, was that which had accumulated in Ellis's real-estate operations, not property which he merely held in trust for others. J. F. Ellis, as president of the corporation, made the agreement for the transfer of property with J. F. Ellis, both as to the particular property to be transferred and the consideration therefor. He testified that the real estate in question was not included in the agreement. True, after the conveyance there were occurrences indicating that such property was understood to be corporate property, yet they were not inconsistent with its being property of another, administered by the corporation in the capacity of agent, while during the same time there were many occurrences entirely inconsistent with any other theory than that the legal title to the property was in J. F. Ellis. This refers to his having mortgaged the property several times to secure his individual indebtedness, and with the knowledge of Allen, who was the only other person interested in the corporation. Again, when Ellis ceased to office with the corporation, the conduct of Allen, who then represented the corporation, was inconsistent with the legal title to the property being otherwise than as claimed by Ellis. He had made an assignment of all his property to the corporation in consideration of an agreement on its part to pay certain liabilities for which he was responsible. No deed, so far as appears, conveying real estate, was made pursuant to that agreement, yet long after the transfer by Ellis was consummated Allen, for the corporation, handed Mr. Ellis the lease of the property in

question, because, as he says, the corporation had concluded to let Mrs. Ellis have it. Let it be admitted that the lease was turned over at that time to effect the purposes testified to by Allen, the fact that no act was considered necessary to carry out such purpose, except to deliver the lease, is inconsistent with the theory that it was then supposed by any one connected with the transaction that the title to the real estate was in the corporation. It is consistent only with the theory that it was supposed the title was in Ellis and the idea was not to convey anything to Ellis for his wife, but to release him from any obligation as to the property in question under his general transfer to the corporation. It seems that there is ample evidence to sustain the findings of fact as made by the trial court at every point.

It is said that plaintiff lost his right by laches. We know of no rule of estoppel by laches applicable to the facts of this case. The action was brought very soon after the discovery of the mistake. Plaintiff did not sleep on his rights. There is no evidence to warrant a claim that plaintiff was negligently ignorant of the situation. The corporation was not prejudiced by the delay in any way. It does not appear that it incurred any expense or was a loser to any extent by reason of plaintiff's asserting his rights at the late day instead of soon after the transfer by J. F. Ellis to it. Mere delay, within the statutory period for relief at law, does not preclude a recovery in equity, and at most that is all which appears here. *Knowlton v. Walker*, 13 Wis. 264. If delay were shown and in the meantime a change in the situation of the parties or the property, so that it would be unconscionable on that account to allow plaintiff at the late day to successfully assert his claim, the question would be different. There is no ground for saying that defendant was prejudiced by laches of plaintiff, or to show that plaintiff was precluded from recovering under the statute of limitations pleaded in the answer. Defendant relied on the

ten-year statute (R. S. 1878, sec. 4215). That applies only to an adverse possession of ten years. The possession here was not adverse, but by agreement. The possession of J. F. Ellis from beginning to end was the possession of plaintiff. Such a possession, however long continued, will not ripen into title. *Lampman v. Van Alstyne*, 94 Wis. 417.

There is a contention that defendant was a purchaser for value without notice. The answer to that is that the court found the facts to be, in substance, that the corporation neither paid anything for the property, nor intended to, but obtained the title through mistake.

It is further contended that there was at least something due J. F. Ellis on the property from plaintiff, and that a recovery should not have been had by plaintiff except on condition of payment to the defendant of any sum due J. F. Ellis. The trouble with that is: First, the court found that nothing was due J. F. Ellis from plaintiff, which we see no reason for disturbing; and, second, the corporation delivered the lease of the property to J. F. Ellis after he severed his connection with the corporation, intending to relinquish any claim to the property, which, as before stated, must have referred to any claim under the general transfer which Ellis made in consideration of the corporation paying the indebtedness for which he was liable. That, of course, left the corporation without any interest in the property even of the character of an indebtedness of plaintiff to J. F. Ellis if such indebtedness existed.

The foregoing covers all points made in the appellant's brief which are considered of sufficient significance to call for special mention, and requires an affirmance of the judgment.

By the Court.—The judgment is affirmed.

ELLIS, Appellant, vs. THE SOUTHWESTERN LAND COMPANY, Respondent. 102 112 409 317

February 22 — March 14, 1899.

Equity: Adequate remedy at law: Rescission of contract: Accounting: Vendor's lien.

1. A complaint alleged that the defendant corporation, in consideration of plaintiff's relinquishment to it of all his interest as a stockholder and the conveyance to it of personal property, agreed to pay certain debts owing by plaintiff, and that it had failed and refused to pay a part thereof. It did not allege insolvency of the defendant or facts entitling plaintiff to a rescission of the contract. It prayed for an accounting and that defendant be required to reconvey. *Held*, that a general demurrer was properly sustained on the ground that the remedy at law for the breach of the contract was complete and adequate.
2. Where, in consideration of the transfer of property to him, a person has agreed to pay certain debts of the vendor, his failure to pay a part of them does not entitle the vendor to a rescission of the contract.
3. An action for equitable relief cannot be sustained on the ground that it *may* prevent a multiplicity of actions, where no facts are alleged to show that such will be the result.
4. To sustain a suit in equity for an accounting, some special and substantial ground of equity jurisdiction must be alleged, and it must appear that the remedy at law is inadequate.
5. In an action for an accounting and to compel a reconveyance of property on the ground that defendant had failed to pay debts of plaintiff which it had assumed in consideration of the transfer, equity will not take jurisdiction on the ground that plaintiff has a vendor's lien on land sold, where it appears that the land was conveyed prior to the making of the contract in question and was not a part of its consideration.

APPEAL from an order of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Action for an accounting and to compel a reconveyance of property. The substance of the complaint is stated in the opinion. The appeal is from an order sustaining a general demurrer.

For the appellant the cause was submitted on the brief of *Frederick A. Teall.*

For the respondent there was a brief by *Wickham & Farr*, and oral argument by *James Wickham.*

BARDEEN, J. The demurrer to the plaintiff's complaint was sustained in the court below on the ground that it appears therefrom that he has an adequate remedy at law. This ruling must be sustained unless we can say that sufficient facts had been stated to warrant us in concluding that the action can be maintained in equity. The grounds urged for our consideration to support the complaint are: (1) That this action may prevent a multiplicity of suits; (2) that an accounting is demanded; (3) that the contract in question creates an equitable lien upon the defendant's property, which only a court of equity can determine and foreclose.

There can be no doubt but that the pleader has attempted to state a cause of action in equity. With some considerable particularity of detail it is alleged, in substance, that the plaintiff was at one time the owner of a large amount of real and personal property; that in the year 1887 plaintiff caused the defendant company to be organized, and conveyed to it all his real estate, and was to receive 366 shares of the capital stock in payment therefor; that he remained the owner of said stock until September, 1893, when, owing to some disagreement with the other members of the company, he made a proposition to sell out his interest in the company, and convey to it all his real estate and personal property, except certain reservations mentioned, in consideration that the defendant would pay and save him harmless from certain debts and obligations, some forty-eight in number, a list of which was attached to his said proposition; that the defendant accepted said proposition, and plaintiff accordingly sold his personal property to defendant, and relinquished to it all his interest as a stockholder; that the

defendant has failed to comply with its agreement to pay the debts mentioned in certain particulars mentioned, and that by reason thereof plaintiff has been compelled to pay thereon the sum of $4,885.74; that defendant has neglected and refused to pay "certain other items of indebtedness which it assumed and agreed to pay as aforesaid,— the particular items, or the amounts due thereupon, or to whom the same are due and payable, the plaintiff is unable to state;" that defendant paid no consideration for the stock and property transferred to it except the sums it has paid in discharge of certain of the obligations it assumed, the amounts of which plaintiff is unable to state. The demand for relief is for an accounting, and that defendant be required to reconvey to plaintiff the property received from him, with his interest in the company, and, if the company is unable to so reconvey them, that plaintiff recover his damages.

Giving to the complaint the widest latitude of construction possible, it seems very clear that the plaintiff has a complete and adequate remedy at law for a breach of the contract. It is not alleged that the defendant is insolvent, nor are there any facts stated which would entitle the plaintiff to a rescission of the contract. It appears from the complaint that defendant agreed to pay some $43,000 of the plaintiff's debts. So far as the *facts* stated in the complaint go, the defendant has failed to pay less than $5,000 of this amount. The general rule is that, to justify a rescission, the failure of the opposite party to perform must be total, so that the object of the contract has been defeated, or rendered unobtainable, by reason of the misconduct or default of the other party. *Topping v. Parish*, 96 Wis. 378. The contention that this action *may* prevent a multiplicity of suits hardly merits sober consideration. No facts are alleged which show that would be the result, and we are not at liberty to speculate on the possibilities of the future. Neither

can this proceeding be maintained because an accounting is asked. In order to sustain a suit in equity for an accounting, some special and substantial ground of equity jurisdiction must be alleged, and it must appear that the remedy at law is inadequate. *Stein v. Benedict*, 83 Wis. 603. The complaint is barren of any such allegation. It does not appear that an accounting has been asked or refused. A court of equity will not assume jurisdiction, and compel an accounting, upon the mere statement of the party that he does not know how the account stands.

Admitting — but not deciding — that with proper allegations the plaintiff might enforce a lien against defendant's property for the amounts he has been compelled to pay, we look in vain for the description of any property, in the complaint, upon which a court of equity might lay its hands in satisfaction thereof. This theory seems to be an afterthought of the pleader, because it is nowhere suggested in the complaint, and is but lamely argued in the brief. It is said that plaintiff had a vendor's lien upon the land sold, which equity will enforce. The difficulty with this suggestion is that it appears from the complaint that his real estate was conveyed to the defendant in 1887,— more than six years prior to the making of the contract in suit. When this contract was made, in 1893, plaintiff sold to defendant certain personal property and his stock in the company. Any lien he may have must arise out of the express terms of the contract, and does not exist by reason of the relation of vendor and vendee of specific real property, for no such relation exists. We think it distinctly appears on the face of the complaint that plaintiff has an adequate remedy at law, and for that reason the demurrer was properly sustained. *Gullickson v. Madsen*, 87 Wis. 19; *Hoff v. Olson*, 101 Wis. 118.

By the Court.— The order of the circuit court is affirmed.

Foss, Appellant, vs. BIGELOW and others, Respondents.

102 413
104 172
104 409

February 23 — March 14, 1899.

Master and servant: Contributory negligence: Obvious risks.

In an action for injuries sustained by an employee in a sawmill while attempting to clear away accumulated sawdust by punching it through a hole left for that purpose in the floor beneath an edger, it appeared that he was twenty-nine years of age, and had worked in the mill two years as a common laborer, and thereafter for some months had been running a "little trimmer" and had occasionally taken the place of an edgerman for a few minutes; that at the time of the injury he was at work on the edger, but had never seen the accumulated sawdust cleared away; that the saws were uncovered and making 2,500 revolutions a minute; and that, while standing above them and trying to remove the dust with a stick four to six feet long, it was caught and thrown violently upward, breaking his jaw. *Held*, that the danger was obvious and he was guilty of contributory negligence.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Richmond & Smith*, and oral argument by *T. C. Richmond.*

For the respondents there was a brief by *Tomkins & Merrill*, and oral argument by *Geo. F. Merrill.*

CASSODAY, C. J. This action was commenced September 20, 1894, and is for personal injuries received by the plaintiff while helping to operate an edger in the sawmill of the defendants, August 15, 1891. Issue being joined and trial had, the court, at the close of the testimony, directed a verdict in favor of the defendants, and from the judgment entered thereon the plaintiff brings this appeal.

There is evidence tending to prove that the plaintiff was hired by the defendants' foreman and general superintendent in the spring of 1888; that he was a common, unskilled

laborer, and had worked in the mill from the time he was so hired until he was injured; that his work until October, 1890, was that of "laying lumber," — that is, standing at the end of the rollers that come from the east edger at the place designated and taking the lumber from the rolls and piling it on the trucks, to be wheeled away by another man; that about October 1, 1890, he was given the job of running the "little trimmer," consisting of one saw at the east side of the mill; that he continued at that work the rest of that season, and from April or May, 1891, when the mill began work, until the time of his injury; that prior to October 1, 1890, he never had had any experience in running an edger or any other machine; that the trimmer was simply a saw located below the table, and operated by taking hold of a handle and drawing it up to cut off the ends of short boards; that the mill was a double mill, with two sets of machinery and men, the one on the east side and the other on the west side; that each side was practically complete in itself, consisting of the rotary saw, gang saws, edger, slab saws or slashers, and trimmers; that to operate this double mill required a large number of men; that the logs were slabbed at the rotary saw, passed through the gang saw, edged at the edger, and passed along the rollers to the trimmer; that the slabs from the rotary went to the slab saws, and were cut into four-foot lengths; that an occasional board from the rotary reached the edger; that from ninety to ninety-nine per cent. of the lumber was cut by the gang saws, and from one to ten per cent. came from the rotary saw; that the mill sawed about 250,000 feet of lumber daily; that if the edgermen failed to get the lumber off the skids as fast as it came down from the gang saws, and it got piled up there, it would be necessary to stop using the gang saws until they got the lumber cleared away; that the operation of the mill depended upon these edgermen keeping the lumber coming from the gang saw clear; that all of the lumber, excepting

slabs, had to go through the edger; that the men employed to operate each edger were experienced, and each received $2.65 or $2.75 a day, while the plaintiff only received $1.65 a day; that this work of edging the lumber was so hard that the edgermen were compelled to change off several times a day; that the west side of the mill cut the small logs, making the work of the edgermen much more active; that the place was noisy; that at different times, when the edgermen or trimmers had to be away for a few moments, someone had to take their places; that after the plaintiff commenced working on the trimmer he was accustomed to do that work when they were away for a few moments; that these were the only men he ever "spelled;" that at the edger he always took the place of the man on the rotary side, and did nothing except to catch the boards that came from the rotary saw, and lay them on the edger for the other edgerman to edge, except that once in a great while the edgerman adjusted the saws and he pushed a board through; that prior to the injury he had never attempted to operate the edger; that underneath the edger there was a hole cut through the floor, about one foot wide, which extended from one side to the other of the edger, through which sawdust was supposed to fall; that this hole was frequently stopped by edgings and sawdust piled up underneath the edger, and required the edgermen to stop and push it down three or four times a day.

There was also evidence that there were six saws in the edger, all on a single shaft, and were adjustable by means of two levers that extended from the front of the edger where the edgermen stood to the saws; that the levers crossed one another about the center of the edger; that the piling up of sawdust under the edger interfered with the operation of the levers, and thereby with the moving of the saws; that when this sawdust got piled up under the edger it had to be removed, and to do that it was the cus-

tom of the edgermen to get up on the edger, and, with a stick from four to six feet long, poke down around the saws until they got the sawdust cleared away; that there were no boards or table on the top of the edger; that in poking this sawdust down the men had to stand on the levers or on a board placed on the rollers right over the saws, and punch the stick in between the saws, and in front of the saws, and behind the saws; that the edger consisted of five or six rollers that turned perfectly free, the last one next to the saws being of iron and known as a "live roller" because it was moved by cogs or belts; that it had little teeth on it, which fed the boards through the edger; that above the "live roller" was another roller that held the boards down; that between these rollers and the saws were "fingers" or iron points several inches long and about two inches apart, like rake teeth, so hung as to let the boards pass under them to the saws for the purpose of preventing the boards from being thrown back when they struck the saws; that there was no covering over the saws; that they were not boxed or in any way protected; that they made about 2,500 revolutions a minute; that at the time of the injury the plaintiff knew nothing about the clogging of the edger by the sawdust, and had never seen the edgermen poke it down or clear it away when he was "spelling" them.

The evidence further tended to prove that on the morning of August 15, 1891, Werner, one of the two edgermen on the west edger, was taken sick and left, after he had worked about half an hour, and the foreman told the plaintiff to go and help Thompson out,—the edgerman still at work; that the plaintiff went and took the place of Werner on the rotary side of the west edger, and continued to work for about one and one-half hours; that Thompson was taken sick, and in a few moments Peter Nevera, another green man, was at work in Thompson's place; that Nevera had

previously been employed in taking lumber from the gang saws and placing it on the skids by the edger, and had no experience in running the edger; that the plaintiff and Nevera continued to run the edger for about half an hour; that they were working very hard; that, in spite of their work, a large pile of lumber had accumulated on the skids; that the levers would not work; that the sawdust had filled up underneath; that the levers worked hard; that Nevera told him to go up and poke the sawdust out; that he told Nevera that he had better go up and do it; that Nevera said, "No; you go up;" that finally the plaintiff got up, and walked on the levers, or the sawdust that had accumulated around them, down near the saws, and, with a stick from four to six feet long, began trying to punch the sawdust down; that the stick he was using struck something and was thrown upward with such violence as to strike him on the point of the chin, breaking his under jaw in three pieces, taking out a portion of the jaw at the front containing three teeth, and otherwise injuring him.

At the time of the trial the plaintiff was thirty-five years of age, and his coworker, Nevera, was thirty-one. That was ten years after the plaintiff had commenced work for the defendants in and about this mill, and about six and one-half years after the injury. The plaintiff was injured August 15, 1891, and he had worked on the "little trimmer" from October 1, 1890. We must assume that he was a man of ordinary intelligence. He necessarily knew that a circular saw, running like the one in question, would be dangerous to a man touching it with a stick from four to six feet long, or anything, and no amount of instruction could make such danger more apparent. To say that he did not know, or that he needed instruction, is to impeach his intelligence. He necessarily knew, moreover, that to touch such saw with such stick, on the side turning away from him, would naturally tend to draw the stick away from him; whereas, to

touch the saw on the side turning towards him, or even on the top, would naturally tend to drive the stick towards him with great force, or, at least, make it dangerous to have hold of it. True, there was sawdust accumulated about the saw. Still, the plaintiff necessarily knew the saw was there and running, and, if he worked there at all, he was bound to regulate his conduct by that fact. Like all such cases, it is hard upon the plaintiff; but, upon the undisputed evidence, we cannot escape the conclusion that his own conduct contributed to the injury. The facts stated are substantially as claimed by counsel for the plaintiff. Of course, every case of personal injury differs in some of its facts from every other; but the principles applicable to a case like this are well settled and require no new discussion. This court has recently held that an employee of mature years, even though inexperienced and uninstructed in the particular business, will be presumed to have known and assumed the risk of an injury incident to obvious defects or dangers, as the unguarded condition of projecting circular saws forming part of the machine at which the employee was set to work, and an accumulation of sawdust, etc., on the floor, although they existed in consequence of the negligence or default of the employer. *Hazen v. West Superior L. Co.* 91 Wis. 208. So, this court has recently held that "an employee in a sawmill, of ten or twelve years' experience, who voluntarily put his hand into a hole in the boxing around a trimmer, and attempted to pick up the end of a broken chain lying within two or three inches of a revolving saw, and was injured by his hand coming in contact with the saw, is held, as a matter of law, to have been guilty of contributory negligence." *Schultz v. C. C. Thompson L. Co.* 91 Wis. 626. To the same effect, *Erdman v. Ill. Steel Co.* 95 Wis. 6. These cases, and numerous others which might be cited, support the ruling of the trial court.

By the Court.—The judgment of the circuit court is affirmed.

McDermott, Respondent, vs. Jackson, Appellant.

102 419
f102 571
102 419
f107 206
108 90

February 23—March 14, 1899.

102 419
112 [4]228

Principal and agent: Authority: Ratification: Special verdict: Instructions to jury.

102 419
113 [1]339

1. In an action against a principal for money borrowed in his name by an agent, there was evidence requiring the submission to the jury of the question whether the agent had actual authority and also whether he had apparent authority. The jury found that he had authority to borrow money, and that the plaintiff believed that he had that authority. *Held*, that the verdict was uncertain as to whether the agent had actual or apparent authority, and therefore would not support a judgment for plaintiff, in the absence of a finding that the plaintiff had reasonable ground on which to base his belief as to the agent's authority.
2. In such a case the better practice would be to submit a question as to each form of authority separately, under proper instructions.
3. No recovery can be had against a principal on the ground of ratification of his agent's unauthorized act in borrowing money which was used in his business, by reason of his retention of the borrowed money, unless he had a reasonable time after notice of the lender's claim, not only to make inquiry into the facts, but also to return the money.
4. If a special verdict is to be rendered, the instructions appropriate to each question, whether asked by the parties or given by the court of its own motion, should be submitted to the jury in immediate connection with the questions to which they are respectively applicable.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Reversed.*

This is an action to recover $500 and interest for money loaned. The complaint contains two counts, one upon a promissory note, and one for money had and received. The undisputed fact was that the money was loaned by the plaintiff to one Arthur Jackson, the defendant's son, who was operating a large jewelry store in the city of Eau Claire for his father, and that a note was given for it signed by

Arthur Jackson as his father's note. Arthur Jackson represented to plaintiff that the money was for use in his father's business; but the defendant denies that Arthur had any authority, either real or apparent, to borrow money or to execute the note, and further denies that the money borrowed was used in his business. Upon a former trial, judgment was rendered for the defendant, and upon appeal to this court that judgment was reversed. 97 Wis. 64.

The case has been tried again, upon evidence not differing greatly from that produced upon the former trial, and the following special verdict was rendered: "(1) Had Arthur Jackson authority from defendant to borrow money on defendant's credit, to be used in defendant's business, on the 13th day of March, 1895? *A.* Yes. (2) Was the money received by Arthur Jackson for the plaintiff upon the note in question paid, laid out, and expended in the business carried on by Arthur Jackson? *A.* Yes. (3) Did the plaintiff loan the five hundred dollars in question on the credit of the defendant, believing that defendant's son, Arthur Jackson, was authorized to borrow the same on such credit? *A.* Yes. (4) Was the note in question executed and delivered to the plaintiff by Arthur Jackson as his own note, or as the note of his father, *Andrew Jackson?* *A. Andrew Jackson's* note. (5) If you answer the second question in the affirmative, then did the defendant, prior to the commencement of this action, know that said money had been used in his business, or have knowledge of facts and circumstances sufficient to put him on inquiry and to enable him, by the exercise of reasonable diligence, to discover the facts? *A.* Yes. (6) If you answer the fifth question affirmatively, then after the defendant had such knowledge or notice, and after a reasonable time in which to discover the facts, did the defendant thereafter, and before the commencement of this action, have reasonable time within which to return said sum of five hundred (500) dollars to plaintiff. *A.* No."

Upon this verdict judgment was rendered for the plaintiff, and the defendant appeals.

For the appellant there was a brief by *Frawley, Bundy & Wilcox*, and oral argument by *C. T. Bundy*.

For the respondent there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*.

WINSLOW, J. It is unfortunate that there must be a third trial of this case, but no judgment for the plaintiff seems possible upon the special verdict before us.

There were three grounds of recovery which the plaintiff was entitled to have submitted to the jury, viz.: (1) Actual authority on the part of Arthur to execute the note; (2) apparent authority; and (3) ratification by the defendant. These grounds of recovery were fully discussed in the opinion of Mr. Justice MARSHALL upon the former appeal. 97 Wis. 64. It was then said, in effect, that there was evidence from which it might be properly found that the discretionary powers given by the defendant to Arthur were so complete as to the purchasing of goods, the making of payments, and the general conduct of the business, that they carried with them the authority to borrow money when necessary in the management of the business, and that this was a proper question for the jury. It was also said that there was evidence to go to the jury upon the question of apparent authority; and it was said that the question upon this branch of the case is, Did the plaintiff, because of appearances for which the principal was responsible, believe, *and have reasonable ground to believe*, that the agent possessed power to act for the principal in the particular transaction in question?

As to recovery upon the ground of ratification alone, it was held that the defendant was entitled to a reasonable time after notice of the plaintiff's claim to make inquiry into the facts, and to a further reasonable time to return the money.

As to the claim of ratification, there can certainly be no recovery by the plaintiff upon this verdict, because the answer to the sixth question of the special verdict distinctly finds that the defendant did not have a reasonable time to return the money; hence one of the essential requisites to a recovery upon the ground of a ratification, as determined upon the former appeal, is wanting. Hence, if the plaintiff recover, it must be upon the ground of actual or apparent authority.

It is unfortunate that both of these questions were covered by one general question, instead of being submitted separately. While it was said upon the former appeal that the question whether Arthur had authority covered both actual and apparent authority, it was not then decided or intimated that one question *only* should be asked to cover both kinds of authority. Upon that appeal the trial court had refused to submit to the jury the question whether Arthur had authority to borrow money on his father's credit, and it was held that this question covered both real and apparent authority, and that it was error to refuse to submit it. While we do not hold it error to submit both forms of authority under one general question with proper instructions, it must be evident to any mind that, if the question is answered in the affirmative, it leaves the matter doubtful whether the jury found actual or apparent authority. The most that can be said is that they found *either* actual *or* apparent authority. Now, had the two questions been submitted separately, and had the jury found actual authority, this would have been all-sufficient to sustain a judgment for the plaintiff; but had they found no actual, but only apparent, authority, it would then have been necessary to go further, and to find, in response to appropriate questions, that the plaintiff not only believed, but in the exercise of reasonable prudence was justified, from the appearances for which the principal was responsible, in believing, that the agent had the necessary authority.

In this case it is found that the plaintiff believed that the agent had the authority, but it is not found that he was justified in such belief by the appearances within his knowledge; hence, as it cannot be affirmed that the jury found actual authority, the verdict is insufficient to sustain a judgment for the plaintiff.

Many exceptions were taken to the rulings on testimony, and to the charge and refusals to charge; but careful examination of them has not convinced us that there was prejudicial error in the rulings, and the legal propositions contained in the charge seem to be substantially correct, and we should not feel compelled to reverse this judgment except for the fatal omission in the verdict above referred to.

We deem it proper to suggest that upon a new trial, if a special verdict be rendered, the instructions appropriate to each question, whether asked by the parties or given by the court of its own motion, should be submitted to the jury in immediate connection with the questions to which they are respectively applicable. This is the only way in which the jury can obtain an intelligent appreciation of the legal propositions which are to govern them in answering the various questions. Upon the present trial nearly two printed pages of instructions were first read by the court at request of the defendant; and the court then proceeded with the general charge, taking up the questions in order, and giving appropriate instructions upon each of them. After the jury had been out a short time, they returned into court and inquired whether they should take the instructions requested by the defendant's counsel as their guide, or the court's own charge. The court explained that they were both the court's charge, but the inquiry made by the jury demonstrates the impolicy of separating the instructions. It is poor practice, and well calculated to confuse a jury, especially in case of a special verdict. The only proper way is to submit each question by itself, and to give to the jury, in direct connection with

that question, every legal proposition which the court deems necessary and proper for the jury to bear in mind in considering that question, and then pass to the next question.

By the Court.— Judgment reversed, and action remanded for a new trial.

TROY CARRIAGE COMPANY, Appellant, vs. BONELL and another, Respondents.

February 23 — March 14, 1899.

Appeal: Amount involved.

Where the only controverted question is whether a contract for the sale of three carriages was separable, and the plaintiff therefore entitled to recover $85, the contract price of one of them, without delivery of the others, this court obtains no jurisdiction by an appeal unless accompanied by a certificate of the trial judge as provided in sec. 3047, Stats. 1898.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Appeal dismissed.*

Action to recover a balance of $199.50 alleged to be due plaintiff from defendants on a sale to the latter of two carriages. The answer admitted a purchase from plaintiff and acceptance by the defendants of one carriage, and that there was due thereon $57. It was alleged that another carriage, ordered by defendants of plaintiff, was taken by the former and stored subject to plaintiff's order, the same not being according to contract; that plaintiff, while the situation indicated existed, contracted to sell the alleged defective carriage to defendants for $85, together with two others, one for $75 and one for $65; that plaintiff failed to perform such contract by refusing to deliver the two carriages; that defendants were damaged thereby in the sum

of $50; and that on account of such breach defendants refused to carry out the contract on their part as to the $85 carriage, but continued to keep the same in store for plaintiff, to their damage in the sum of $12. Defendants counterclaimed for $62 on the facts stated.

On the trial it was conceded that $63 was due plaintiff for principal and interest on old account. The court decided as a matter of law that plaintiff was not entitled to recover for the $85 carriage and was liable for damages for breach of contract. It was left to the jury to assess such damages and strike a balance between the same and the $63 conceded to be due plaintiff on old account, and to render a verdict accordingly. The result was a verdict for defendants for $21. No contention is made in this court that the damages were improperly awarded to defendants or that the amount assessed was too large. The sole question is, Was the ruling of the trial court correct as to the contract for the three carriages being entire, so as to preclude plaintiff from recovering for the $85 carriage by reason of the failure to deliver the other two carriages? Judgment was rendered on the verdict in defendants' favor, and plaintiff appealed.

Frederick A. Teall, for the appellant.

For the respondents there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*.

MARSHALL, J. The action was on contract. The amount involved, exclusive of costs, as the cause is presented in this court, is $85. Appellant claims that the court erred in holding that the contract to sell and deliver to defendants three carriages was entire. Whether that be right or not rules the question of whether plaintiff is entitled to recover for the one carriage which was delivered to defendants. There is no other controversy on this appeal.

An appeal involving less than $100 exclusive of costs, in such an action as this, is not allowed by statute, except on a

certificate submitting to this court, on a statement of facts, difficult questions of law for its decision. Stats. 1898, sec. 3047. If an appeal be taken in a case requiring the certificate mentioned in order to make it appealable, and such certificate be absent, this court does not obtain jurisdiction to entertain such appeal. *Henk v. Baumann*, 100 Wis. 28. This appeal comes within that rule and must therefore be dismissed.

By the Court.—The appeal is dismissed.

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102 426
f109 105
109 497

102 426
113 [2]381
113 382

102 426
115 [2]581
115 [2]589
116 [2]140

THE NORTHWESTERN FUEL COMPANY, Respondent, vs. LEE, Garnishee, Appellant.

February 24—March 14, 1899.

(1) *Appeal: Findings.* (2, 3) *Corporations: Sale of assets: Authority of president.* (4) *Garnishment: Property subject to execution: Appeal.*

1. The findings of the trial court will not be disturbed on appeal where there is evidence to support them and no preponderance of evidence against them.
2. A corporation may, by its acts and methods of conducting its business, so far as third persons are concerned, as effectually clothe its officers with authority to manage, and even close out its business, as though a formal vote of record were taken.
3. A sale of personal property, constituting a closing out of the business of a corporation, accompanied by delivery of possession, is sustained in this case, although made by the president without the formal sanction of the board of directors, it appearing that the articles of organization expressly provided that the president should have the general direction, management, and control of the property, affairs, and business of the company, subject to the direction of the board of directors; that during the entire existence of the corporation he had conducted its affairs as chief managing officer; that the board of directors either knew of the transaction or did not know because they intrusted everything to the president; and that they took no steps to disaffirm it, even when garnishment proceedings had been instituted against the purchaser by a creditor of the corporation.

4. An objection to garnishment proceedings on the ground that the principal defendant had property subject to execution sufficient to satisfy the plaintiff's claim cannot be raised for the first time in the supreme court.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

The plaintiff brought an action against the defendant, and summoned *C. S. Lee* as garnishee. The defendant defaulted, and the garnishee answered, denying liability. Issue was taken upon the answer so made, and upon the trial the court made findings in favor of plaintiff, and entered judgment against the garnishee, from which this appeal is taken.

For the appellant there was a brief by *Frawley, Bundy & Wilcox*, and oral argument by *C. T. Bundy*. They argued, among other things, that the president of a corporation could sell the company's assets only in the usual course of business. 3 Thompson, Corp. § 3982; 4 id. § 4632; *Stokes v. N. J. Pottery Co.* 46 N. J. Law, 237; *Hoyt v. Thompson*, 5 N. Y. 327; *Walworth Co. Bank v. Farmers' L. & T. Co.* 14 Wis. 325, 330. Even the board of directors cannot sell the assets and business without the consent of the stockholders. 3 Thompson, Corp. § 3983. A board of directors cannot act except when in session as a board, nor can the directors ratify an act done by such directors in their individual capacities. 3 Thompson, Corp. § 3905; *Baldwin v. Canfield*, 26 Minn. 43.

For the respondent there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*.

BARDEEN, J. The findings are vigorously attacked on the ground that they are not supported by the weight of the evidence. The chief question litigated on the trial was whether the garnishee had in fact purchased of the defendant certain personal property, consisting of coal, sheds, office, safe, office furniture, wagons, etc., of which he held pos-

session at the time of the service of the garnishee summons. The testimony was chiefly given by the garnishee and F. D. Sullivan, who had been the president and chief managing officer of the defendant company. Both admit that *Lee* made a proposition to purchase this property, but they insist that the deal was never consummated. Neither of the witnesses was frank and outspoken in giving his testimony. They dodged and hedged in every way possible, and made evasive and shuffling answers to very many of the questions put to them. The court evidently believed that they were impeached by the surrounding facts and circumstances. Were the case to stand upon the naked assertions of these two witnesses, it would be difficult to support the conclusion arrived at by the circuit judge; but, when viewed in the light of the attendant facts and circumstances, we do not feel justified in disturbing it. Considering the reluctance of the witnesses in answering questions, the shifty and evasive answers given, and the contradictions found in the testimony of *Mr. Lee*, we can readily see how the trial judge felt obliged to discredit the statements made, and to give weight to the other facts which put such testimony in dispute. The language of Mr. Justice MARSHALL in *Senour Mfg. Co. v. Clarke*, 96 Wis. 469, seems especially applicable to this case: "The trial judge has an opportunity of seeing and hearing the witnesses, observing their manner while testifying, and the benefit of many aids, of a persuasve character, calculated to materially assist in drawing correct inferences in regard to the facts, that cannot be preserved for the benefit of the appellate court; hence, the justice of the rule that such inferences will not be displaced by others drawn by such appellate court, unless the former are against the clear preponderance of the evidence, is apparent, and why it should be firmly adhered to is also manifest." It is unnecessary to run over in detail the testimony to be found in the record to support the findings. It is sufficient to say

that we find evidence to support them, and no clear preponderance against them.

It is especially urged that the evidence fails to show any authority of record, from either the stockholders or board of directors of the defendant, to the president, to close out the property of the corporation in the manner claimed in this case. There can be no doubt of the general rule that a president of a corporation, by virtue of his official position, can only sell its assets in the usual and ordinary course of business. But a corporation may, by its acts and the methods of conducting its business, so far as third persons are concerned, as effectually clothe its agents with authority to handle, and even close out, its business, as though a formal vote of record were taken. It appears that the president, by the articles of organization, was expressly clothed with extraordinary powers in managing the business of the corporation. Article 6 says, in effect, that the president shall have the general direction, management, and control of the property, affairs, and business of the company, subject to the direction of the board of directors. From the inception of business down to the time of the alleged sale to *Lee*, Sullivan had been the head and front of the corporation, and had conducted its affairs and handled its business as the chief managing officer. It is in proof that *Lee's* proposition to purchase the property in question had been talked over by the board of directors. There can be no doubt but that they were informed of the proposition, and that the matter was considered by them, although no formal record was made of the action taken. This seems to be quite in accord with their usual practices. Sullivan was the moving spirit, and conducted the business and handled the affairs of the company without any limitation as to his authority from the board. We find that, very soon after *Lee's* proposition was talked over by the board, Sullivan bills to him several full car loads of coal they had recently purchased, and *Lee*

enters into possession of the property. He sells the coal, holds possession of the office, and shortly before the service of the garnishee process pays over to the corporation some $1,200 or more, in pursuance of the terms of his proposition to purchase. If the board did not know of this deal, it was because they were intrusting everything to Sullivan; and, if they proposed to disaffirm the sale to *Lee*, it was their duty to act promptly. No such action was taken, and to this day the corporation has not attempted to rescind the deal. They might have appeared in this proceeding and contested the matter; but they remained quiescent, and have left *Lee* and Sullivan to fight their battles. Considering the extraordinary powers vested in the president, and the manner in which he was permitted to conduct the business and handle the affairs of the company, we are satisfied that the rules laid down in *Ford v. Hill*, 92 Wis. 188; *John V. Farwell Co. v. Wolf*, 96 Wis. 10; and *McElroy v. Minnesota P. H. Co.* 96 Wis. 317, are applicable here, and fully sustain the conclusion of the trial court.

The court having found that there was a sale of this property to *Lee*, which finding we have sustained, it becomes immaterial to inquire whether there was certain coal turned out to him to pay the Holm order. Whatever was done in that regard was done subsequent to the alleged sale. The fact that the company gave an order on the garnishee to Holm is confirmatory of the theory of a sale. At the time of the service of the garnishee summons, *Lee* had coal which he afterwards sold for $356.72. This was $143.08 more than the Holm order, and which, with the purchase price of the other property, is more than the amount of plaintiff's judgment.

It is further urged that the court should have dismissed the proceeding because the evidence showed that the defendant had property subject to execution sufficient to satisfy the plaintiff's claim. There is no motion to dismiss the garnishee

proceedings that we can find in the printed case, and no ruling of the court is preserved from which we can infer that such a motion was made. If any such motion was made, we are unable to find any record of it, and without it we find no necessity for ruling on that question. If such a motion was in fact made, the evidence as to the property possessed by defendant is so unsatisfactory that we are not able to say that the court abused its privilege in denying it.

By the Court.—The judgment of the circuit court is affirmed.

THE STATE EX REL. BARBER, Appellant, vs. MCBAIN, Clerk, etc., Respondent.

February 24—March 14, 1899.

Terms of court: Final adjournment: Powers of clerk.

1. The term of office of a circuit judge expired on Monday, January 3d. On the preceding Thursday, December 30th, he instructed the clerk to hold open the current term of court during the ensuing two days and until the expiration of his said term of office, and that then the business of the term would be concluded and the term would stand adjourned. *Held*, that this was not a direction to the clerk to enter a final adjournment.
2. Final adjournment of a term of court is a judicial act, requiring the presence of the court, and power to perform it cannot be delegated to the clerk.
3. Where the court has merely directed that a term be held open, without adjournment to any specific day, and the judge thereafter fails to attend, the clerk has no power, under sec. 2573, Stats. 1898, to enter a final adjournment. The power given by that section is to be exercised only within the exact conditions there prescribed, that is, when the judge fails to attend at the time fixed by law for holding the term, and for three days thereafter, or when he so fails to attend on a day during the term which has been fixed by an adjournment thereto.
4. Under sec. 2572, Stats. 1898, a term of court does not come to an end by failure to adjourn to a specific time, but once commenced it continues until terminated by an affirmative judicial act or by the commencement of a new term.

APPEAL from an order of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

The relator was plaintiff in a suit to close up a corporation from which he, a stockholder, had received certain security for advances. On December 30, 1897, order and judgment was entered allowing final account of the receiver, sustaining plaintiff's security, and directing distribution of the proceeds of assets amongst creditors. The next regular term of that court commenced the third Monday of March. It had been a custom of the judge to keep the term in Eau Claire county open, so that court business could be done at any time, and this was accomplished by a direction to the clerk simply "to hold the court open." The term of the then circuit judge (BAILEY) expired on Monday the 3d of January. He had ten days previously announced to the bar that he should adjourn the court for the term at the expiration of his term of office. On December 30th, at the close of business, he gave certain instructions to the clerk, as to which he and the clerk, in affidavits now made, differ. He states that his instructions were "to hold said term open during Friday and Saturday, being the 31st of December, 1897, and the first day of January, 1898, and until the expiration of affiant's term of office, and that then the business of the term would be concluded and the term would stand adjourned." The clerk states the judge's instructions to have been: "Hold it open just as we have done. I will be here to-morrow and Saturday." The entry on the records is the usual one: "Court held open." Judge BAILEY did not attend or hold court either Friday or Saturday. On January 18, 1898, the then circuit judge (O'NEILL) made an order to show cause, returnable before said court on February 1st, why that judgment and certain orders should not be vacated and set aside, and amendments and changes in pleadings be permitted, practically reopening the whole matter, upon which order to show cause the said judgment and order have been fully vacated, and various proceedings since had. The

prayer to the circuit court was for a writ of *mandamus* commanding the respondent, as clerk, to enter and record a final adjournment of said December term, 1897, on the minutes of said court, *nunc pro tunc* as of some date which the court should direct, prior to the 18th day of January, 1898, as provided by section 2573 of the Revised Statutes of Wisconsin, or show cause to the contrary.

For the appellant there was a brief by *Frawley, Bundy & Wilcox*, and oral argument by *C. T. Bundy*. They argued, among other things, that if a judge adjourns the court without fixing any time for it to reconvene, it cannot again convene before the next regular term. 12 Am. & Eng. Ency. of Law, 296; *People v. Sanchez*, 24 Cal. 17; *Wight v. Wahlbaum*, 39 Ill. 554; *People v. Bradwell*, 2 Cow. 445; *Irwin v. Irwin*, 2 Okl. 180; *In re McClaskey*, 2 Okl. 568; *In re Terrill*, 52 Kan. 29. An adjournment must be either without day or to a day certain. 1 Ency. of Pl. & Pr. 243; *Johnson v. Railway Co.* 47 Ohio St. 318. The power to adjourn a court is a judicial power which cannot be exercised by the clerk without statutory authority. 6 Am. & Eng. Ency. of Law (2d ed.), 135, 136, note; 1 Ency. of Pl. & Pr. 241; *Irwin v. Irwin*, 2 Okl. 180; *In re Terrill*, 52 Kan. 29.

For the respondent there was a brief by *F. M. Miner* and *Fleming & Blum*, attorneys, and *Olin & Butler*, of counsel, and oral argument by *H. L. Butler*.

DODGE, J. Appellant apparently makes three contentions: First, that the direction of the court given on December 30th made it the duty of the clerk to enter on the record a final adjournment upon January 1st; second, that the statute (sec. 2573, R. S. 1878) made it the duty of the clerk, upon nonappearance of the judge either on December 31st or January 1st, to enter daily adjournments for three days, and then to finally adjourn the term; third, that by failure of the court to adjourn to a specific time the term came to

an end. Without stopping now to discuss whether any, and, if so, what, of these contentions, if sustained, would support the relief prayed, namely, *mandamus* commanding the clerk to enter and record a final adjournment on some date prior to January 18th, we will consider these several positions.

1. The petition, with the attached affidavits made part thereof, does not support appellant's first contention, as a fact. The utmost force that can be given to Judge BAILEY's own statement of what transpired only establishes that the clerk was instructed to make entry holding the court open for the ensuing two days, with the expectation that the court would then be present, accompanied by a declaration that the judge on December 30th had a purpose to finally adjourn the term on January 1st. Final adjournment is a judicial act, requiring the presence of the court to perform; and, as the court was not sitting on the 1st of January, such judicial act could not have been performed. Many of the authorities hold that power to perform such act cannot be delegated to the clerk; so that, even had Judge BAILEY on December 30th definitely instructed the clerk to finally adjourn the term on January 1st, it would not have been effective to authorize such act. *In re Terrill*, 52 Kan. 29; *In re McClaskey*, 2 Okl. 568.

2. The second contention of appellant also fails of support in the facts alleged. Sec. 2573, of course enacted for the purpose of preventing the failure of a term, confers power on the clerk only to enter a final adjournment, first, when the judge fails to attend at the time fixed by law for holding the term of court and for three days thereafter, and, secondly when he so fails to attend on a day during the term which has been fixed by an adjournment thereto. Neither of these conditions is here present. The court had not adjourned to a specific day, but had merely made an order, now become entirely customary with our courts and

with the courts of the United States, that the term be "held open," the effect of which is merely that the adjournment is to a time to be fixed in the future according to the exigencies of business. *East Tenn. I. & C. Co. v. Wiggin*, 68 Fed. Rep. 446; *Harrison v. German-Am. F. Ins. Co.* 90 Fed. Rep. 758, 762. This statutory power of the clerk to thus exercise the judicial function in putting an end to the existence of the court until the next term is an extreme one, and is to be exercised only within the exact conditions prescribed by the statute, which clearly contemplates a situation analogous to the commencement of a term by law, and a similar failure of the judge to be present at an appointed time, in order to confer this authority on the clerk.

3. The proposition that, unless a term of court is kept alive by adjournment from one day to another, the court goes down for that term and can have no business existence again until revived by the commencement of a new term, is expressly negatived in Wisconsin by sec. 2572, which provides that no omission to adjourn from day to day, previous to final adjournment, shall vitiate any proceedings in such court. The same conclusion has been reached by other courts without such legislation. *Schofield v. Horse Springs C. Co.* 65 Fed. Rep. 433; *People v. Sullivan*, 115 N. Y. 185; *In re Dossett*, 2 Okl. 369. According to modern policy and methods, a term of court, having been duly commenced, continues until the court itself, by an affirmative judicial act, terminates it, or until the next term. Freeman, Judgments, § 90; *Hume v. Bowie*, 148 U. S. 245; *Schofield v. Horse Springs C. Co., supra; Union Pacific R. Co. v. Hand*, 7 Kan. 380. In deference to modern methods of business in court, involving in many jurisdictions the combination of equitable and legal proceedings, the term of court has come to mean a period of time within which there may be many sessions, while anciently it meant a single session, indeed, originally, a single day, which in order to meet the demands of busi-

ness was enlarged in fact to several, although in theory the single day extended over the whole sitting. No state has gone farther than Wisconsin in its legislation to indicate a policy of vesting in its courts complete discretion and control over the times and methods of conducting their business, and of relieving them from technical restrictions thereon. Secs. 2422*a*, 2427, 2428, 2429, 2572, 2573, Stats. 1898, and many others, evince such policy; and it may safely be said that between the legal commencement of the term, and the time when it is expressly terminated by a judicial determination or by the commencement of a new term, the power of the court over the time when, and the manner in which, business before it shall be conducted, is complete (*Barrett v. State*, 1 Wis. 175; *Green v. Morse* [Neb.], 77 N. W. Rep. 925), with only the limitation that if such power is abused to the prejudice of a litigant error may be predicated thereon and may be reviewed and corrected.

The petition does not show that the December term of the Eau Claire circuit court had been finally adjourned, either by the court, or by the clerk under circumstances authorizing him to do so; and for that reason, without considering others, the action of the court in quashing the alternative writ was proper.

By the Court.— Order quashing alternative writ of *mandamus* is affirmed.

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102 436
104 214
102 436
106 505
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108 568
102 436
110 [3] 82
110 [3]409
53 LRA 605
102 436
111 [3] 63
111 [3]250

CARROLL, Appellant, vs. FETHERS and others, Respondents.

February 24 — March 14, 1899.

Pleading: Amendment during trial: Discretion: Evidence: Election between remedies: Waiver of tort.

1. In a tort action for the conversion of money it is *held* not to have been an abuse of discretion to allow defendants to amend their answer during the trial so as to allege that in a former action (which

had been dismissed because plaintiff declined to bring in another defendant) plaintiff had sought, with full knowledge of the facts, to recover the identical sum of money upon an implied contract as for money had and received, and had thereby waived the tort,—it appearing, among other things, that plaintiff had greatly delayed the prosecution of the tort action, that an order dismissing it for want of prosecution had been set aside as a matter of favor to him, and that the amendment could not operate as a surprise.

2. In an action for the wrongful conversion of money, under an answer denying such conversion, the record of a former action brought by plaintiff to recover the same money upon an implied contract as for money had and received was admissible to show that the conversion had been waived.

3. One who, with full knowledge of the facts, sues to recover money upon an implied contract as for money had and received thereby waives all right to bring a subsequent action on the theory that the money was wrongfully converted.

APPEAL from a judgment of the circuit court for Walworth county: FRANK M. FISH, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Joseph B. Doe*, attorney, and *Charles W. Felker*, of counsel, and oral argument by *Mr. Felker*. They argued, *inter alia*, that the amendment is a plea in abatement, and was not pleaded in its proper order, and could not be joined with a plea in bar. *Brown Co. v. Van Stralen*, 45 Wis. 675, 677; 1 Chitty, Pl. (11th Am. ed.), 446; *Johnson v. Wilson*, 1 Pin. 65; *Reif v. Paige*, 55 Wis. 496, 502; *Hooker v. Greene*, 50 Wis. 271, 276; *St. Clara F. Academy v. N. W. Nat. Ins. Co.* 101 Wis. 464; *Vincent v. Starks*, 45 Wis. 458, 460; *Dutcher v. Dutcher*, 39 Wis. 651, 660. To permit it to be set up after plaintiff had rested at the trial was an abuse of discretion. *Fogarty v. Horrigan*, 28 Wis. 142; *Sweet v. Mitchell*, 19 Wis. 524; *Dole v. Northrup*, 19 Wis. 249; *O'Connor v. C. & N. W. R. Co.* 92 Wis. 612; *Morgan v. Bishop*, 61 Wis. 407; *Smith v Dragert*, 61 Wis. 222.

Charles Quarles, of counsel, for the respondents.

CASSODAY, C. J. This action was commenced March 24, 1891, to recover $5,550, alleged to have been money belonging to the plaintiff, and paid to the firm composed of the defendants, April 9, 1889, and by them "unlawfully and wrongfully converted and disposed of . . . to their own use." Judgment was demanded for that amount as damages, with interest thereon from April 9, 1889.

The case turns upon the question whether the fact that this plaintiff, in a former action against these defendants for the same money, waived the tort and sought to recover the money upon an implied contract, is a bar to this action. The facts in regard to the two actions are evidenced by documents in the record, and are to the effect that for some years prior to April 9, 1889, there was an important litigation between *Carroll*, the plaintiff in this action, and one Little, and which came to this court, and is reported in 73 Wis. 52. A. Hyatt Smith was the attorney of record for *Carroll* in that action. The firm of the defendants were of counsel for *Carroll*. As a result of that litigation, Little, the defendant party, paid to the firm of the defendants, as such counsel, April 9, 1889, about $7,000. The defendants took and retained out of that sum the amount of their disbursements and their charges, which are conceded to have been reasonable, and paid the balance to A. Hyatt Smith, who was *Carroll's* attorney of record. On September 29, 1890, the plaintiff commenced an action against the defendants for the recovery of $5,550 of the money so received by them April 9, 1889, and interest thereon from that date, and alleged in his complaint that on that day he demanded payment thereof from them, which payment they refused to make. The defendants answered that complaint to the effect the facts stated, and that, after taking from the moneys so received their charges and disbursements, and moneys paid to or on behalf of *Carroll*, they paid the balance of the

money so received by them to A. Hyatt Smith, as the attorney of record of *Carroll*, and alleged that Smith was a necessary party to the action, and prayed that he be made such party defendant. On December 15, 1890, the court ordered that the summons and complaint be amended by making A. Hyatt Smith a party defendant, and that upon the failure of the plaintiff, *Carroll*, to so amend, the action should stand dismissed. The plaintiff failed to comply with such order, and so that action was dismissed, and the costs taxed, and judgment therefor entered thereon in favor of the defendants accordingly.

After the plaintiff had paid such judgment for costs, he commenced this action against these defendants, March 24, 1891, for the unlawful and wrongful conversion and disposal of such money, as stated. On April 9, 1891, the defendants answered similarly to their answer in the former action, and alleged the other facts stated, and that A. Hyatt Smith, the attorney of record in the Little suit, and to whom they paid such money, was a necessary party, and prayed that he be made such party. On April 16, 1891, the defendants noticed the cause for trial. On April 18, 1891, the court ordered that A. Hyatt Smith be made a party defendant. The plaintiff appealed from that order, and the same was reversed April 12, 1892. Such reversal was claimed in this court on the ground that the controversy was whether the defendant had wrongly converted the money; that "Smith would not be liable for the conversion of his codefendants, nor would they be liable for any wrongful conversion by Smith, as they acted independently of each other." This court held that Smith was improperly made a party, because the case was not within the statute cited therein, but was an action "to recover damages for the unlawful conversion of personal property" (82 Wis. 69); that a "wrongful conversion by more than one person is a several, as well as a joint, wrong, and the injured party may

sue one or more of the wrongdoers without suing them all" (82 Wis. 70).

At the November term of the circuit court for 1892, the plaintiff obtained a change of venue to Walworth county by reason of the alleged prejudice of the judge. The defendants noticed the cause for trial at the February term, 1893, and the October term, 1893. At that term the cause was tried and the jury disagreed. The defendants noticed the cause for trial at the February term for 1894, when the plaintiff procured a continuance. Upon an order on the plaintiff to show cause why the action should not be dismissed for want of prosecution, the same was dismissed, February 23, 1897, and a judgment was thereupon entered in favor of the defendants, dismissing the action, and for taxable costs. Such judgment, and order on which it was based, were set aside and vacated July 3, 1897. The plaintiff for the first time after November, 1892, noticed the case for trial at the October term for 1897.

The cause was tried for a second time November 1, 1897. Upon that trial the defendants offered in evidence the records in the original action so brought by the plaintiff against these defendants, including the order requiring the plaintiff to make A. Hyatt Smith a party defendant, and the dismissal of that action for failure of the plaintiff to comply with that order. Such records were so offered for the purpose of showing that the plaintiff had elected to waive the tort and sue on an implied contract to recover the same money. The plaintiff objected to the admission of such records upon the ground that such defense was affirmative and had not been pleaded, and the court sustained such objection. Thereupon the defendants asked and obtained leave of the court to amend their answer by alleging the records in such former action so commenced September 29, 1890, and the fact that the plaintiff there sought to recover the identical sum of money, with interest thereon, here sought to

be recovered, upon an implied contract as for money had and received, with full knowledge of the facts, and hence that he had waived any and all claim for a conversion of the money or other wrongdoing. Such records of the former action were thereupon admitted.

At the close of the trial, and by reason of the plaintiff in his complaint in such former action having waived the alleged tort and sued for the same money upon such implied contract, the court directed a verdict in favor of the defendants, and from the judgment entered thereon in favor of the defendants for costs the plaintiff brings this appeal.

The facts recited suggest two questions for consideration:

1. Was it an abuse of discretion to allow the amendment? The case had been pending for more than six years. The original cause of action upon implied contract was barred by the statute. During that time the plaintiff had noticed the cause for trial but once, and that was five years before the last trial. During that time the defendants had noticed the cause for trial at four different terms of the court, and eight months prior to that trial had obtained an order and judgment dismissing the action for want of prosecution. As a matter of favor to the plaintiff, the court, in its discretion, set aside that judgment and order four months before the last trial. The amendment to the answer simply allowed the defendants to prove a record made by the plaintiff himself, and which, from its nature, was conclusive, and hence could not be disproved. The amendment of the answer, therefore, did not, and could not, operate as a surprise to the plaintiff. It was certainly in the furtherance of justice that the plaintiff should abide by the record he had himself made in the controversy over this same money. The purpose of the statutes is that controversies, so far as practicable, should be determined upon the merits; and hence the trial court was required, in every stage of the action, to disregard any error or defect in the pleadings or proceedings which did

not affect the substantial rights of the plaintiff. R. S. 1878, sec. 2829. A supposed advantage, by reason of a technical defect in the answer, whereby such records, made by the plaintiff himself, might have been kept out of the case, cannot be regarded as a substantial right of the plaintiff. The case is clearly distinguishable from the one recently decided by this court, relied upon by counsel for the plaintiff. *St. Clara F. Academy v. N. W. Nat. Ins. Co.* 101 Wis. 464. We are constrained to hold that the allowance of the amendment, under the circumstances stated, was not an abuse of discretion.

2. We reach this conclusion the more readily because, in our judgment, such record evidence was admissible without such amendment. The original answer denied the alleged unlawful and wrongful conversion and disposition of the money, and alleged that the defendants lawfully delivered the same to the plaintiff's attorney of record. The records so admitted conclusively proved that the plaintiff had waived such unlawful and wrongful conversion, and hence that the cause of action alleged no longer had any existence. This court has held that an unauthorized contract for the sale and conveyance of land, which, with full knowledge of the facts, had been ratified by the owners, barred them from maintaining an action of trespass for cutting timber upon the land. *Warren v. Landry*, 74 Wis. 144. In that case it was claimed that proof of such ratification was improperly made, because it was not pleaded in Landry's answer; but it was held that the proof was properly admitted under the answer of the other defendants, and it was said in the opinion of the court that, "besides, we are inclined to think it was admissible upon that answer, since it tended to prove that the trespass alleged had in fact been waived by the plaintiffs." Id. 152. That suggestion is fully supported by a decision in New York, in which it is held that "where the owner of goods wrongfully taken has waived the tort and

recovered in an action *ex contractu* against some of the tort feasors, he is estopped by his election from maintaining trover and conversion against the others. The record of such former recovery may in an action for conversion be given in evidence under a general denial." *Terry v. Munger*, 49 Hun, 560; *S. C.* 121 N. Y. 161. In this last report of the case, it was held, in effect, that, where the owner thus elects to treat the transaction as a sale, the title to the property passes to the wrongdoer; that proof of the commencement of the former action, with full knowledge of all the facts, is just as conclusive upon the question of election as a judgment would be. When it becomes necessary to elect between inconsistent rights and remedies, the election, when made, is final, and cannot be reconsidered, even where no injury has been done by the choice or would result from setting it aside. See, also, *Fowler v. Bowery S. Bank*, 113 N. Y. 450; *Conrow v. Little*, 115 N. Y. 387, 393. In this last case it was held that, "where a party takes legal steps to enforce a contract, this is a conclusive election not to rescind on account of anything then known to him." So, it has been held in Michigan that "waiving the tort of a conversion, and suing in *assumpsit*, amounts to an election to regard the defendant as owner of the property converted, and estops the plaintiff from bringing trover against the defendant's vendee." *Nield v. Burton*, 49 Mich. 53. This court has held that "an action *ex contractu* to recover money paid by a bank to defendant, and alleged to have been had and received by him to the use of plaintiff, is an election to ratify and affirm the payment, and precludes a subsequent action to recover the money from the bank, on the ground that such payment was unauthorized." *Crook v. First Nat. Bank*, 83 Wis. 32; *Hildebrand v. Tarbell*, 97 Wis. 446. That case was distinguished, but the principle here applicable was sanctioned, in *Bank of Lodi v. Washburn E. L. & P. Co.* 98 Wis. 549. See, also, *Huganir v. Cotter*, *ante*, p. 323.

In the first action the plaintiff refused to comply with the order making A. Hyatt Smith a party defendant, and so submitted to the dismissal of that action, and then commenced this action for the unlawful and wrongful conversion of the money, for the manifest purpose of preventing Smith from being made a party to this action, and thus to avoid a controversy with him as to whether the money was properly paid over to him by the defendants or not. To that extent the plaintiff was successful. *Carroll v. Fethers*, 82 Wis. 67. But the plaintiff cannot escape the effect of his election to waive the tort and sue upon implied contract in the first action. That that was an action upon implied contract there can be no question. *Rawson Mfg. Co. v. Richards*, 69 Wis. 643; *Casgrain v. Hamilton*, 92 Wis. 179. That this is an action sounding in tort has been expressly determined. *Carroll v. Fethers, supra.* Such determination is *res adjudicata.*

By the Court.— The judgment of the circuit court is affirmed.

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102 587

ROMMERDAHL, Appellant, vs. JACKSON and others, Respondents.

February 24 — March 14, 1899.

Partnership: Certificates of stock: Assignment: Chattel mortgages: Garnishment: Election between remedies: Accounting.

1. Where partners have by agreement used certificates of stock to indicate the proportionate interest of each in the firm, a transferee of such certificates does not become a member of the firm, in the absence of an agreement to that effect, but obtains merely the right to demand an accounting and to receive the proportionate share of the net firm property after such accounting.
2. A transfer, as collateral security, of certificates of stock used by partners to indicate the proportionate interest of each in the firm is not a chattel mortgage within the meaning of sec. 2313, Stats. 1898, providing for the filing of such mortgages. That statute ap-

plies only where the mortgaged property is capable of manual delivery.

3. A partner whose interest in the firm was indicated by certificates of stock assigned such certificates, either absolutely or as collateral security, to various persons. Afterwards, by bill of sale, he transferred his apparent interest in the partnership to an innocent purchaser, promising to deliver the certificates in a few days, the consideration to be paid on their delivery; and the purchaser took possession of the seller's interest. Before the consideration was paid a creditor of the seller garnished the purchaser, and she brought the agreed price into court. The assignees of the certificates were interpleaded, and each answered claiming a share of said fund. *Held*, that this constituted a ratification by said assignees of the transfer to the garnishee, and an election to consider the money as standing in place of their interests or rights in the firm assets. The rights of all parties might therefore be properly adjusted in the garnishment action without an accounting.

APPEAL from a judgment of the circuit court for Kenosha county: FRANK M. FISH, Circuit Judge. *Affirmed.*

The plaintiff sued Urban J. Lewis, September 16, 1895, and recovered judgment for over $5,000. At the time of the commencement of the suit, garnishee process was served upon Eda Meinhardt, who immediately made answer, and brought into court moneys and securities amounting to $6,000, and an order was made interpleading the defendants *Jackson* and others as claimants of parts of said fund so brought into court. The interpleaded defendants made their answers, each claiming a part of said fund, and the action was tried by the court. The facts were practically undisputed, and were as follows:

About May 1, 1894, Eda Meinhardt, the garnishee, who was then cashier of a bank at Burlington, Wisconsin, and the defendant Urban J. Lewis, who was then cashier of the bank of Dan Head & Co., at Kenosha, Wisconsin, together with two other capitalists, entered into a partnership, with the purpose of doing a banking business at Antioch, Lake County, Illinois; the organization of the enterprise being princi-

pally intrusted to the defendant Lewis. Lewis contributed $6,000 to the capital stock, which was $12,000 in all, and caused to be issued certificates of stock, which on their face purported to be stock certificates in a corporation of the par value of $100 per share, and had an assignment in blank upon the back. The other partners acquiesced in the issuance of these certificates, but the uncontradicted evidence is that it was understood between the members of the firm that they were not transferable. In August, 1895, the bank of Dan Head & Co. and Urban J. Lewis personally were financially embarrassed, and the garnishee defendant, Eda Meinhardt, went to Kenosha, August 26, 1895, for the purpose of buying Lewis's interest in the Bank of Antioch, and did on that day purchase his apparent interest in the bank for $6,000, and obtained a bill of sale therefor. Lewis informed the garnishee that he could not deliver the certificates of stock at that time; so it was arranged that the consideration should be paid by the garnishee later, on the receipt of the certificates of stock, which Lewis promised to send to her.

The garnishee testifies that she had no knowledge that Lewis had transferred any of his stock at that time, and there is no testimony to the contrary of this fact. The consideration of $6,000 was to be paid by delivering a note of the bank of Dan Head & Co. for $2,000, an opera-house bond for $500, and the balance of $3,500 in cash on receipt of the certificates of stock. None of Lewis's copartners had knowledge of his transfer of the certificates of stock. On securing a bill of sale the garnishee took immediate possession and control of Lewis's interest in the partnership, and still has such possession. Before paying any of the consideration money, the garnishee summons in this action was served upon her, and she paid into court $3,500, and also delivered the bond and note referred to in the bill of sale.

The interpleaded defendant *Jackson* holds certificates,

issued to Lewis and assigned to him, amounting to $1,500, for which he had given that amount of cash to Lewis to invest in the Bank of Antioch. The defendant *Emilie M. Holt* holds nine shares of said so-called stock as collateral security for the payment of $875 due her from the bank of Dan Head & Co. The defendant *A. A. Pribnow* holds five shares of said stock as collateral security for $500 loaned by him to Lewis. The defendant *George Hale*, as assignee of Dan Head & Co., holds thirteen shares of said stock as collateral security for a loan of that amount by said Dan Head & Co. to Lewis. The defendant *John Clauson* holds two shares of said stock as collateral security for a debt due him from the bank of Dan Head & Co.

Upon these facts the circuit court ordered that the various interpleaded defendants be first paid, out of the moneys deposited in court by the garnishee, the amounts due them respectively, amounting in all to $4,400 with costs, before any payment be made out of said funds to the plaintiff; and from this judgment the plaintiff appeals.

For the appellant there were briefs by *Palmer & Gittings*, and oral argument by *W. C. Palmer*.

For the respondent *Jackson* there was a brief by *Lloyd & McDowell;* for other respondents a brief by *Cavanagh & Fisher;* and the cause was argued orally by *Peter Fisher* and *G. R. McDowell*.

WINSLOW, J. The so-called Bank of Antioch was a partnership, and not a corporation, and hence the certificates of stock which were issued were not in fact certificates of corporate stock in any true legal sense; but nevertheless there was nothing to prevent the partners, if they so agreed, from using such certificates to indicate the proportionate interests of each partner in the firm. *Durkee v. Stringham*, 8 Wis. 1. It is well understood that a partner may sell or mortgage his interest without consulting his copartners, but that the assignee does not become a partner thereby, but acquires

only a right to receive, upon settlement of the partnership business, that sum which would have been due to his assignor or mortgagor. 1 Lindley, Partnership (2d Am. ed.), 363 *et seq.* In the absence of an agreement to that effect, the assignee of a partner's share does not become a member of the firm nor the owner of any of the firm property, "but he comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the partnership debts." *Bank v. Carrollton Railroad*, 11 Wall. 624.

In the present case the undisputed testimony is that the original parties to the partnership agreed that the certificates of stock should not be transferable.

Thus the assignees of Lewis, who received the certificates of stock either by way of purchase or as collateral to an indebtedness, became entitled thereby to a mere right to demand an accounting and to receive their proportionate shares of the net firm property after such accounting. This intangible right, however, they did become entitled to, as against the remaining partners, unless, indeed, there is ground for holding that such transfers, which were made by way of collateral security for debts, amounted to chattel mortgages, and hence were void as to third persons because not filed in the office required by law. This claim, however, is not tenable. The chattel mortgage statute refers only to personal property capable of delivery, as its words clearly indicate, and not to a defeasible assignment of a mere right or chose in action. This principle is well settled. Jones, Chattel Mortgages (4th ed.), § 278, and authorities cited. As said in the quotation from the United States supreme court hereinbefore contained, the right which these assignees obtained is one which cannot "be tangible, cannot be made available, or be delivered." It has been held that assignments, by way of security for debt, of mere rights or choses

in action, such as rights under a lease, or an insurance policy, or certificates of corporate stock, or a legacy, or a judgment, or an open account, are chattel mortgages in effect, but are not the chattel mortgages which are covered by the registry statutes, because these statutes only apply where the mortgaged property is capable of manual delivery. Stats. 1898, sec. 2313; *Lawrence v. McKenzie*, 88 Iowa, 432, and cases cited in opinion.

The inevitable conclusion is that the transfers made by Lewis of his certificates of stock to the various interpleaded defendants, whether absolute or as collateral security, gave to each assignee the equitable right above defined, and that such transfers were good, even as against attaching creditors of Lewis, though not recorded as chattel mortgages. The money representing Mr. Lewis's original half interest in the banking firm having been deposited in court by the garnishee, and the assignees having all been brought into court and answered, claiming shares in the fund, and the plaintiff, the only other adverse claimant to the fund, being also in court and claiming the fund, no reason is perceived why the rights of all parties should not be finally settled as they were by the trial court. There is no need of an accounting, because all parties have, by claiming their interests in the fund in court, in effect ratified the transaction by which the value of the Lewis interest in the firm has been liquidated and turned into cash.

The garnishee says, in substance: "I bought the Lewis interest in the firm out, and agreed to pay $6,000 for it; and I now pay this money into court." The various claimants under Lewis come into court, and make their various claims to this money; thus beyond doubt ratifying the transfer to the garnishee, and electing to consider the money as standing in place of any interest or right in the firm assets.

By the Court.— Judgment affirmed.

MARSHALL, J., dissents.

102 450
103 174
102 450
105 580
102 450
109 481

SHORES LUMBER COMPANY, Appellant, vs. STITT and another, Respondents.

February 25 — March 14, 1899.

Contracts: Construction: Conveyance of railroad property: Logs and logging: Custom.

1. At the time of making a contract by which defendants were to cut and deliver large quantities of logs each year for several years at plaintiff's sawmill, it was agreed that defendants should purchase from plaintiff, among other things, a logging railroad and its equipment, then used in carrying logs to said mill. A bill of sale was executed, conveying in general language all of plaintiff's camp and logging outfit, with a specification of the different kinds of property of which said outfit consisted, the description therein of the railroad property being as follows: "One locomotive, eighteen cars, and all the rail and railroad material of every name and nature." Thereafter plaintiff turned over the railroad property as it then existed to defendants, and it was used by them for a considerable time, and until trouble arose between the parties, with no intimation that the transfer did not include the right to use the bed on which the rails were laid. *Held*, that the bill of sale, when viewed in the light of the transaction of which it formed a part and of the practical construction given it by the parties, conveyed the right of way of the railroad.
2. A written contract for the cutting of pine timber, requiring that it be cut "in a workmanlike manner," refers to the customary manner of cutting such timber at the place of the contract, and prior conversations as to the method of doing such work elsewhere cannot be considered as forming any part of the agreement evidenced by the writing.
3. In determining the meaning of words or terms used in a contract, the custom or usage of the place of the contract governs, whether both parties knew of such custom or not. The place of the contract is the place of its making, unless its terms indicate another place for performance.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action for damages for breach of contract and to recover for the use of the right of way of a railroad. The case was

tried by a referee who found the facts as to the various claims for damages and for the use of the railroad right of way in favor of the defendants, and found that there was a sum of money due the defendants on counterclaims pleaded by them, which findings were approved by the trial court, and in accordance with which judgment was rendered.

The evidence in the case is very voluminous and the findings of fact numerous. To give a complete history of the cause would require a very long statement. Only such statement will be made as appears to be necessary to present the controverted questions of law and fact as they appear in this court.

The contracts called for the cutting, hauling, and delivering of 35,000,000 feet of logs per year for several years. The referee found that the contracts were modified by parol as to the annual amount to be delivered. Damages were claimed for failure to deliver 35,000,000 feet of logs per year, but were disallowed because of the parol modification mentioned. The fact as to the modification is controverted on this appeal on proper exceptions to the findings.

As a part of the transactions between plaintiff and defendants in making the logging contracts, it was agreed that the latter should purchase of the former a logging railroad and its equipment. The transaction in that regard was consummated by a written bill of sale, which contained no other description of the railroad property except the following: "One locomotive, eighteen cars, and all the rail and railroad material of every name and nature." At the time the bill of sale was made there was a logging railroad four and one-half miles long, equipped with a locomotive, rails, and cars, constructed for use and in use in carrying on logging operations to stock plaintiff's sawmill, which it was designed defendants should continue, and which they agreed to do as a part of the transaction which called for such bill of sale. After the making of such bill of sale the

entire railroad property was delivered to defendants, and no claim was made that any interest therein was retained by plaintiff till after the contract relations between the parties had ceased. As an inducement to defendants to purchase the railroad property, plaintiff represented to defendants that there would be an opportunity for them to haul outside logs at a profit. The claim in suit was that the right of way of the railroad was not sold and that plaintiff was entitled to compensation for the use of it in hauling outside logs. The referee found that the entire railroad property was conveyed to defendants, and that plaintiff was estopped from claiming otherwise because of the representations made before the sale, that defendants would be enabled to use the property profitably for hauling outside logs. Exceptions were duly filed to the court's findings in regard to these matters.

The contract required the logs to be cut in a workmanlike manner. A large claim for damages was made for waste of timber by the defendants in cutting the trees too high. Plaintiff claimed that the customary way of cutting timber in Michigan was in contemplation by the parties when the contracts were made, which was to cut the trees down lower than was customary where the logging operations in question were performed. That was denied by the defendants. The court held that, the place of the performance of the contract being in the vicinity of Chequamegon Bay, Bayfield county, the customary way of cutting timber there governed, and that the work under the contracts was done in a workmanlike manner tested by the usual method of cutting timber in that locality; that as operations progressed trees that were considered by plaintiff's employees to be cut too high were designated by them and the loss determined and charged to defendants. Exceptions were taken to the findings and conclusions of the court in respect to this claim for damages.

So, as the case stands in this court, appellant claims that the findings of fact should be modified so as to award to it damages for failure to deliver 35,000,000 feet of logs per year, compensation for use of the railroad right of way, and for the loss of timber by reason of the trees being cut too high from the ground.

For the appellant there was a brief by *Cate, Sanborn, Lamoreux & Park*, and oral argument by *B. B. Park*.

For the respondents there was a brief by *Gleason & Sleight*, and oral argument by *E. F. Gleason*.

MARSHALL, J. The first assignment of error is that the circuit court erred in finding a parol modification of those portions of the written contracts which required a delivery of 35,000,000 feet of logs per year. Whether such modification was made or not was a question of fact, and the finding in regard to it is binding on this court unless we can say it is against the clear preponderance of the evidence. After a careful consideration of that part of the record bearing on the subject we are unable to disturb the decision of the trial court, testing it by the rule referred to. To our minds the evidence fairly preponderates in favor of such decision rather than against it.

The next contention made is that plaintiff did not convey to defendants the railroad right of way, and that the finding on that subject is wrong; hence that the failure to allow plaintiff compensation for the use of such right of way is also wrong. Whether that finding is correct or not turns on the construction of the bill of sale. That seems to convey the entire railroad property, when viewed in the light of the circumstances of the transaction of which the making of it formed a part, and in the light of the construction which the parties themselves gave to the instrument. That such instrument will admit of two constructions is quite evident. The descriptive part is very general. First, there is

language conveying all of the plaintiff's camp and logging outfit, and that is followed by specifications of the different kinds of property intended by the general language, which, as to the railroad property, is in the following words: "One locomotive, eighteen cars, and all the rail and railroad material of every name and nature." The railroad property consisted of a right to use the bed upon which the rails were laid, and the rails and railroad equipment as well. It was one entire property in use and for use in the logging operations necessary to the furnishing of stock for plaintiff's sawmill, which was the purpose of the contracts with the defendants and the conveyance of such property to them by the bill of sale. In carrying out the terms of the bill of sale, the railroad property as it then existed was turned over to defendants and was thereafter used by them up to the time of the trouble out of which this litigation grew, without any intimation on the part of plaintiff that the transfer did not include the entire railroad outfit. It appears very plainly that such was the intention and that such intention may fairly be attributed to the language of the bill of sale, in the light of all the circumstances leading up to the making of the logging contracts and what occurred afterwards, as we have before stated. That was the conclusion of the trial court, with which we fully concur.

It is further contended that the customary way of cutting pine timber in Michigan was discussed between the parties at the time of and before the making of the contracts, and became a part thereof, and was referred to therein by the requirement that the timber should be cut in a workmanlike manner. The contracts were made and to be performed in the vicinity of Chequamegon Bay, Wisconsin. We know of no rule of law that will sustain the contention that a custom existing at some other place, quite remote from that of the contracts, can be said to have been in the minds of the parties and to have become a part of such contracts. Where

no particular manner of performing a contract is specified in it, the usage at the place of the contract is essentially a part of it, the same as though actually written into it. If we were to test the requirements of a written contract by the usage at some other place than that of its performance, it would involve a violation of the well-settled rule of law that the latter place governs, and that other rule that the terms of a written contract cannot be varied by parol.

The learned counsel urged with confidence the rule that a custom, in order to be binding between parties to a contract, must be brought home to the knowledge of both of them, either by showing actual knowledge on their part at the time of the making of such contract, or the existence of the custom for so long a time as to raise a presumption that they had such knowledge and entered into the contract with reference to it. That rule of course prevails in case of an attempt to annex to a contract some incident not expressed therein, as in the case of *Hewitt v. John Week L. Co.* 77 Wis. 548, where the question was whether the owner of a sawmill, under his contract to saw logs by the thousand, was entitled to the slabs. There is a difference between evidence of usage to establish a custom for the purpose of annexing that as an incident to a contract, and the same kind of proof to show the meaning of some word or term used in a contract. In the latter situation the meaning of the term as understood at the time and place of the contract governs, whether both of the parties knew of such meaning or not. They are presumed to contract with reference to the meaning of words and terms used by them, as such words and terms are understood at the place of their contract; therefore, proof of such meaning is all that is required to enable the court to determine just what the language of the contract was intended to express. That is the effect of *Walker v. Syms* (Mich.), 76 N. W. Rep. 320, cited by respondents' counsel, and the doctrine is elementary. Jones, Com. & Tr. Cont. § 63.

The expression "place of the contract," as used here, means the place of its making, unless its terms indicate another place for performance; then such other place is the one called for by such expression, and the parties are presumed to have agreed to be governed by the usage at such place, as to the interpretation of words and terms requiring that in order to determine the meaning of the language used by them, as effectually as if such agreement were plainly expressed in the contract.

It follows that the decision of the trial court was right in holding that the term "workmanlike manner" referred to the customary way of cutting timber in the vicinity of Chequamegon Bay, the place of the contract, and that conversations as to the method of doing such work elsewhere could not be considered as forming any part of the agreements evidenced by the writings.

The foregoing disposes of all the questions that could be profitably discussed in this opinion. No error is perceived in the record.

By the Court.—The judgment is affirmed.

102	456
s112	1880
112	1882
102	456
117	1303

ADAMS and another, Appellants, vs. RODMAN and others, Respondents.

February 25—March 14, 1899.

Wills: Attestation in presence of testator: Evidence: Special verdict: Immaterial errors: Practice after rendition of advisory verdict: Findings and judgment.

1. Claimed in a will contest that two of three subscribing witnesses signed the attestation clause in the absence of the testator at the residence of one of such two, such one being a lawyer of large experience and the personal friend and confidential adviser of the testator. Such lawyer witness was dead at the time of the trial, and the other two supported the claim of the contestants. The

finding on that and other evidence was that only one witness signed in the presence of the testator. *Held*, on appeal, that the presumption as to the truth of the attestation clause, arising from the professional character of the deceased witness and his relations to the decedent, was not sufficient to warrant holding that the decision of the trial court was against the clear preponderance of the evidence. WINSLOW, J., dissents.

2. The rejection of evidence to prove a fact established beyond controversy in the case is not reversible error.

3. The statement of several propositions in the conjunctive, in the question of a special verdict, only one of which propositions is in controversy, where the court directs the jury to answer yes or no to the question according as they shall find on the disputed proposition, is not prejudicial error.

4. In a case tried by the court, the verdict of a jury, if taken, being only advisory, errors in the submission of questions or instructions given by the court in regard thereto, to the jury, are not necessarily prejudicial error.

5. Where a cause is tried by the court and a jury is impaneled for the purposes of an advisory verdict, and the cause is fully tried and submitted, neither party is entitled to a hearing as a matter of right after the coming in of the special verdict and before the findings by the court are filed. [WINSLOW, J., is of the opinion that after the rendition of such a verdict an opportunity should be given for a hearing and for the defeated party to move for findings and judgment notwithstanding the verdict.]

6. Upon the filing of a decision and order for judgment in an equity case, in or out of term, judgment may be entered accordingly without any further proceedings in the cause.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Walworth county: W. F. BAILEY, Judge. *Affirmed.*

A will contest. There were three witnesses to the will. The formal parts of the execution and attestation were perfect, but it was contended that the instrument was put in form by one Silas W. Menzie at the law office of himself and father, and there signed by said Menzie and the testator, and that it was then taken by one Whalen to the residence of the elder Menzie for examination, where it was approved by him, and then by him and said Whalen signed as wit-

nesses in the absence of the testator. The controversy was as to whether either Whalen or the elder Menzie signed the will in the presence of the testator. On that question the county court found in the negative and refused to admit the will to probate. An appeal was taken to the circuit court, where the controverted issue of fact was submitted to a jury, resulting in a finding the same as the decision of the county court. After the verdict of the jury was received, and without any further opportunity for the proponents to be heard, the presiding judge filed his findings of fact, wherein he adopted the verdict of the jury and directed judgment accordingly. The question submitted to the jury was as follows: Did Robert L. Rodman, in his lifetime, execute the paper writing propounded as his last will and testament, and did the witnesses whose names are thereto subscribed attest and subscribe the same in the presence of said Rodman, and were they competent at the time they so subscribed their names thereto? The court, at the foot of the findings, directed judgment to be rendered against the proponents of the will, and judgment was rendered accordingly, from which this appeal was taken.

For the appellants there was a brief by *Cooper, Simmons & Nelson*, attorneys for *Winfield Rodman*, and *J. V. Quarles*, of counsel, and oral argument by *John B. Simmons*. They contended, *inter alia*, that the attestation clause is very full, complete, and formal, reciting all the details of a valid execution. Such an attestation clause, especially when signed by witnesses having knowledge upon the subject, raises an almost conclusive presumption of due execution and entitles the will to probate, in the absence of recollection by the subscribing witnesses, and even against their positive contradictory testimony. *Will of Jenkins*, 43 Wis. 610; *Will of Meurer*, 44 Wis. 392; *In re Lewis's Will*, 51 Wis. 101; *Will of O'Hagan*, 73 Wis. 78; *Loughney v. Loughney*, 87 Wis. 92; *Theological Seminary v. Calhoun*, 25 N. Y. 422; *Tarrant v.*

Ware, 25 N. Y. 425; *Will of Cottrell*, 95 N. Y. 330; *Will of Hesdna*, 119 N. Y. 615; *Will of Pepoon*, 91 N. Y. 255; *Rugg v. Rugg*, 83 N. Y. 592; *In re Bernsee's Will*, 141 N. Y. 389; *Peck v. Cary*, 27 N. Y. 1, 30–32; *Gable v. Rauch*, 50 S. C. 95; *Stockwell's Will*, 17 Misc. (N. Y.), 108; *Brissell's Will*, 16 App. Div. 137; *Carey's Will*, 14 Misc. (N. Y.), 486, 71 N. Y. St. Rep. 593; *Gwin v. Gwin*, 48 Pac. Rep. 295; *In re Stacey*, 6 Ohio Dec. 499; *Carey's Will*, 24 App. Div. 531; *In re Coleman's Estate*, 185 Pa. St. 437.

D. B. Barnes, attorney, and *Malcolm G. Jeffris*, of counsel, for the respondents, to the point that the due execution of a will cannot be presumed, in opposition to positive testimony, merely upon the ground that the attestation clause is in due form and states that all things were done which are required to be done to make the instrument valid as a will, cited *Lewis v. Lewis*, 11 N. Y. 220–224.

MARSHALL, J. The sole question that requires consideration on this appeal is, Does the evidence clearly preponderate against the finding of the trial court that neither the witness James Whalen nor the witness R. R. Menzie attested the execution of Rodman's will in his presence? Substantially all the direct evidence supports that finding. Three witnesses signed the attesting clause. One, R. R. Menzie, died before the will was presented for probate. The two surviving witnesses both testified to the effect that neither the deceased Menzie nor the witness Whalen signed in the presence of the testator. There were some circumstances corroborating such evidence, and the case thus made on behalf of the contestants was opposed by the presumption that arises from the attesting clause itself and the probabilities of its truthfulness growing out of the fact that the deceased Menzie was a lawyer of large experience in his profession and would not have been likely to have signed a false attesting clause, especially to an important instrument which

would be defeated by the falsehood. The case on the part of the contestants was also opposed by some other circumstances. We do not deem it necessary to go into detail and state particularly all the evidence and all the circumstances upon each side of the controversy. We have called attention to the most material portions of it. The jury heard the witnesses and passed upon their credibility with much better opportunity for determining the truthfulness of their testimony than this court possesses. The circuit judge adopted the conclusions of the jury, presumably upon a careful consideration of the evidence, and we are unable to say that such conclusion is wrong in the light of the rule governing the subject in this court.

True, as counsel for appellants contend, the fact that the attesting clause states that the witnesses signed the instrument in the presence of the testator raises a strong presumption that they did so sign, and such presumption should prevail unless overcome by clear and satisfactory evidence. True, also, the fact that R. R. Menzie was a lawyer of large experience in his profession is a strong circumstance in support of the truth of the attesting clause signed by him. If there were any indication in the record that the law in that regard was not in the mind of the learned circuit judge and was not applied by him and by the jury to the evidence, that would go a long way to enable us to say that the conclusion arrived at is wrong; but no such indication exists. On the contrary the learned circuit judge instructed the jury very clearly and fully that the legal presumption was in favor of the truthfulness of the attesting clause. He instructed them as to the importance of the law in that regard for the due protection of the testamentary right. He stated to the jury that very clear and satisfactory evidence was required to overcome the legal presumption referred to, and he called their attention particularly to the fact that a finding that R. R. Menzie did not attest the will in the presence

of the testator would convict him of stating over his signature what he must have known was a falsehood. All the reasons which appellants principally urge upon this court in support of the theory that the attesting clause is true were called to the attention of the jury by the trial judge, and they found that it was untrue both as to R. R. Menzie and James Whalen, and the presiding judge also so found, and such finding appears to be in harmony with the decision of the county judge who first passed upon the question. In view of all these facts and the record as we find it, we are unable to come to the conclusion that the fact passed upon by the jury and found by the court, as to the witnesses of the will, was found wrong and is contrary to the clear preponderance of the evidence.

Many questions are discussed in the brief of counsel for appellant, which are not material to this appeal, yet we will briefly notice some of them

Some wills drawn or copied by Silas W. Menzie before the date of the will in question were received in evidence, and it was established beyond reasonable controversy by such evidence and other evidence, particularly by the fact that he had been engaged in the profession of the law for some fifteen years before the date of the Rodman will, that he knew the manner in which a will should be executed. In that situation, other wills were offered, drawn by the witness or copied by him after the date of the Rodman will, and such offer was rejected. The ruling was duly excepted to. That exception is urged here upon the ground that the rejected evidence bore on the credibility of the witness in regard to his evidence in explanation of some statements attributed to him as to the validity of the Rodman will, notwithstanding what he claimed to be the fact as to neither his father nor Whalen having signed it in the presence of the testator. If the rejection of the evidence was error at all, it was harmless error, because, as we have seen, the fact

is established beyond reasonable controversy that the witness knew, when the Rodman will was drawn, all the requisites of a valid will. Therefore additional evidence to the same effect could not have benefited the proponents. If his attempted explanation of how he came to say that the Rodman will was valid was improbable because of his knowledge of the requisites of a valid will, that improbability stands out just as significant in the record without the rejected evidence as it would with it.

Complaint is made that the court framed a verdict so as to include three propositions, while as to two of them there was no controversy. It is not perceived how the appellants were prejudiced by that, because, by the instructions given to the jury, they were confined to the disputed proposition and directed to answer yes or no to the questions according as they should find in regard to such dispute. Moreover, a verdict in an equity case being merely advisory, if not proper in form, that does not constitute harmful error sufficient to affect the judgment.

Several exceptions are called to our attention to instructions given to the jury and to refusals to instruct. A complete answer to such exceptions is that errors of that kind in an equity case are not reversible.

Further complaint is made that the trial court gave no opportunity for a hearing on the part of the appellants after the verdict was received and before the findings of fact and conclusions of law and the direction for the entry of judgment were filed. No merit is perceived in such complaint. The uniform practice in equity cases, where all the questions of fact have been submitted for decision, is for the court to file the proper findings and conclusions of law without any further hearing. That is what the statutes seem to contemplate and such has always been the practice in this state; and it cannot be varied by the practice of courts elsewhere, if such practice exists. The subject is plainly regulated by

statute. Sec. 2863, Stats. 1898, provides that upon a trial by the court its decision shall be given in writing and filed with the clerk, and judgment shall be entered accordingly; and sec. 2422*a* provides that whenever any matter is heard by the court or presiding judge, the decision thereof may be made out of term and may be by an order or judgment or direction that an order or judgment be entered; and upon filing such decision in writing or the order or judgment signed by such judge in the office of the clerk of the circuit court in the county where the action or proceeding is pending the same shall be entered by the clerk and judgment shall be entered accordingly. It will be seen that when a case has been submitted, which it is the duty of the trial judge to decide, nothing further need be done till the findings are placed on file in the office of the clerk of the circuit court, and when such findings are so filed, if they contain a proper direction for the entry of judgment, judgment is then to be entered without further proceedings.

The foregoing covers all that need be said on this appeal.

By the Court.—The judgment of the circuit court is affirmed.

WINSLOW, J. A dissent upon a mere question of fact is rarely justifiable, but, so strong is my conviction that justice has miscarried in this case that I am compelled to record my dissent upon such a question. This will was executed with apparently all due formalities in 1881, and fifteen years later it is sought to defeat its validity by the vague and misty recollections of three witnesses, against the certificate, made at the time, of two lawyers who knew what was necessary to constitute a valid execution. The attestation clause states that the witnesses signed in the presence of the testator. This creates a very strong presumption that the fact was as stated, especially after the lapse of fifteen years; and that presumption cannot be overcome, except upon very

clear and convincing proof. *In re Lewis's Will*, 51 Wis. 101. Such proof, in my judgment, is not here. Robert R. Menzie is shown by the evidence, and admitted by all the parties, to have been an able lawyer of long practice in Wisconsin at the time this will was executed. He drew this will. He signed the attestation clause. He knew what was necessary to properly attest a will. Mr. Rodman was an old and valued client. Either Robert R. Menzie was guilty of an act of idiotic carelessness, or else he was false to his client, if he signed the will as a witness in the absence of his client and permitted Whalen to do the same thing. No one has the hardihood to claim that Robert R. Menzie was a half-wit, or that he was false to his clients.

Nor do I think the circuit judge should have made findings without giving the parties an opportunity to be heard or make a motion after the rendition of the verdict. I do not pretend to know what the practice is in all of the trial courts of the state, but I do know that for several years, when the writer was on the trial bench of the First circuit, it *was not* the practice to enter judgment upon an advisory verdict without giving the defeated party an opportunity to move for findings and judgment notwithstanding the verdict. Further, I may say that it seems to me that such opportunity should always be given, and I think it is given in well-conducted trial courts.

On April 7, 1899, the judgment of this court was modified so as to provide that appellants' costs in this court and in the circuit court should be paid out of the estate.

TOEPFER, Assignee, Respondent, vs. LAMPERT and another, Appellants.

102 113 465 ²472
102 116 465 ²322

February 25 — March 14, 1899.

Voluntary assignment: Filing of papers: Sheriff's return: Conclusiveness.

1. Although sec. 1695, R. S. 1878, provides that the assignee's bond, together with a copy of the assignment, shall be filed by the officer taking the same in the office of clerk of the circuit court, the manual filing of the paper by a messenger, instead of by the officer himself, will not avoid the assignment, if the papers are in all other respects properly executed and are filed in proper time.
2. The rule that a sheriff's return upon execution as to his official acts done thereunder is conclusive upon the parties to the action and their privies does not preclude an assignee for the benefit of the creditors of an execution debtor from showing, in contradiction of the return, that the levy was not in fact made until after the filing of the assignment, because if the assignee's title accrued before the levy he is not a privy and not bound by the return.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action of trover to recover the value of a stock of hardware. The plaintiff is the assignee under a voluntary assignment made by J. C. Koelsch, for the benefit of his creditors. Koelsch owned the stock of hardware in question, and on the 17th of February, 1897, executed a voluntary assignment to the plaintiff before Wesley Mott, a court commissioner at Menasha, Wisconsin. Mott did not take the assignment and bond personally to the clerk of the court at Oshkosh, but intrusted them to one J. M. Pleasants, an attorney, who had been the attorney of Koelsch in drawing the papers, to take them to Oshkosh and file, indorsing upon the papers a written request to the clerk to file the same. The papers were placed on file at three minutes past 1 o'clock on the 17th of February, 1897. On the same day

judgment upon a judgment note given by Koelsch to the John Pritzlaff Hardware Company was duly entered, and at 11:20 o'clock in the forenoon the execution thereon was delivered to the defendant *Florian*, who was then the sheriff of Winnebago county. He immediately proceeded to Koelsch's store, but did not find Koelsch there, he being engaged in preparing the assignment. He stayed at the store some twenty minutes or more, but did not exhibit his writ nor state to the clerk that he made any levy, and the business apparently went on as usual. A few minutes before 12 o'clock noon, Koelsch and *Toepfer* went to the store and found *Lampert* there. Some conversation took place, but what that conversation was is disputed; *Lampert* testifying that he told Koelsch that he had an execution and had levied on the stock, but Koelsch testifying that *Lampert* said he had not yet taken possession. Koelsch and *Lampert* went to an hotel, and took dinner with the attorney of the judgment creditor, leaving *Toepfer* at the store, who locked it and took the key. After dinner *Lampert* found the store locked, and then posted notices on the outside announcing that he had levied on the stock therein, and later in the afternoon broke open the door. Thereafter *Lampert* proceeded to sell out the stock and apply the proceeds upon his execution. He also made a return upon the execution, in which he stated that he levied upon the stock at 11:20 o'clock a. m.

A special verdict was returned by the jury as follows: "(1) Did the sheriff, by his deputy, *Matt Lampert*, levy upon and seize the goods in controversy on the 17th of February, 1897, under the execution, before the hour of one o'clock and three minutes in the afternoon? *A.* No. (2) At what time were the notices of levy posted on the doors of the two stores? *A.* 1:15 p. m. (3) What was the fair market value, at Menasha, Wisconsin, February 17, 1897, of the goods in controversy? *A.* $1,550." Upon this verdict judgment was rendered for the plaintiff, and the defendants appeal.

For the appellants there was a brief by *Bloodgood, Kemper & Bloodgood*, attorneys, and *Jackson B. Kemper* and *Wheeler P. Bloodgood*, counsel, and oral argument by *J. B. Kemper* and *C. W. Felker*.

For the respondent there was a brief by *Bouck & Hilton* and *J. M. Pleasants*, and oral argument by *Mr. Pleasants* and *Mr. Gabe Bouck*.

WINSLOW, J. Two important questions are presented in this case, namely: (1) Was the assignment void because the officer taking it did not personally take it to the clerk's office and file it? (2) Was the sheriff's return as to the time he made his levy conclusive on the plaintiff in this action.

1. The statute provides (sec. 1695, R. S. 1878) that the assignee's bond "shall immediately after its execution, together with a full and true copy of such assignment, be filed *by the officer taking the same* in the office of clerk of the circuit court," etc. It is argued that this provision is strictly mandatory, and that the court commissioner must with his own hand deliver the bond and copy of the assignment to the clerk, and cannot intrust the same to a messenger. This precise question has not been heretofore decided by this court, though several of the other provisions of secs. 1694–1696, R. S. 1878, have been presented, and have uniformly been held mandatory. See *Grever v. Culver*, 84 Wis. 295, where the authorities are reviewed. In *Fuhrman v. Jones*, 68 Wis. 497, the commissioner sent the bond and copy of assignment to the clerk's office by the hand of the assignee, and without his indorsement thereon showing that he was satisfied with the sufficiency of the sureties. Some ten days later the commissioner called at the clerk's office, and placed his certificate on the bond, but, certain creditors having attached in the meantime, it was held that, as against creditors, title had not been vested in the assignee at the time of the levy of the attachment. There is no discussion in that case as to

what effect the fact, alone, of the failure of the commissioner to personally file the papers was considered to have upon the judgment, and we do not think it can be fairly said that the point was determined in that case.

Since these cases were decided, however, a distinct change has taken place in legislative policy regarding the assignment statutes. Under the provisions of sec. 2, ch. 334, Laws of 1897 (now sec. 1694, Stats. 1898), the legislature has made ample provision for the correction of almost every possible error, defect, or informality in the execution or filing of the assignment and accompanying papers. Among other things it is provided that "no mistake in filing a copy instead of an original, or any like mistake or inadvertent failure to comply with the provisions of the chapter, shall avoid the assignment." Thus it is manifest that the legislative policy at the present time is distinctly in favor of the carrying out of voluntary assignments, even though some provision of law has not been fulfilled. They are regarded with favor, and every opportunity is now given to make them effectual, even if technically defective. This change of legislative policy is referred to and recognized in *Western T. Co. v. Teasdale*, 97 Wis. 652; and in *Eau Claire G. Co. v. Hubbard*, 97 Wis. 661, in which last case it is said that where "the trend of legislation is such as to show a manifest purpose to secure an equal distribution of the property of insolvents, wherever they in good faith make a conveyance of all their property with that intention, the court so far as possible should carry out such legislative policy."

In view of this manifest change of legislative policy, we hold that the manual filing of the assignment papers by a messenger, instead of by the officer, will not avoid the assignment, where it appears, as in this case, that the papers were in all other respects properly executed and filed in proper time.

2. The fact was undisputed in the case that the assignment

papers were filed in the clerk's office at 1:03 o'clock p. m. The sheriff made his return upon his execution, in which he certified that he levied upon the property at 11:20 o'clock a. m., and it was claimed below and is claimed here that this return is conclusive in this action and cannot be contradicted. The trial court ruled, however, that it was open to contradiction, and much evidence was introduced as to the time when the sheriff's levy was actually made, resulting in a verdict that it was not made until after the filing of the assignment. The reception of this evidence is now assigned as error. The rule is frequently broadly laid down that the return of a sheriff upon process in his hands as to his official acts properly done thereunder is conclusive upon the parties to the action and their privies, and cannot be collaterally impeached, but must be set aside, if at all, in some direct proceeding brought for the purpose. Murfree, Sheriffs (2d ed.), § 868, and cases cited. The rule is referred to with approval in *Knowlton v. Ray*, 4 Wis. 288, and recognized as correct in *Carr v. Comm. Bank*, 16 Wis. 50. But an exception to the rule has been made in the cases of *Rape v. Heaton*, 9 Wis. 328, and *Pollard v. Wegener*, 13 Wis. 569, where it is substantially decided that the return may be contradicted when the question of jurisdiction of the party arises, and it may be shown that jurisdiction was never in fact obtained, notwithstanding recitals to that effect in the record. *St. Sure v. Lindsfelt*, 82 Wis. 346. The principle is that the record is no record unless the party to be bound by it was served with process, and this fact is open to investigation. So, here, it may be admitted that the sheriff's return as to the time of his levy is conclusive upon the parties to the action and their privies; but the question is, Was the plaintiff a privy? If the assignment was filed, and he had possession, before any levy was made, then he was not a privy, because his title accrued before the sheriff's levy, and he would not be bound by anything the sheriff might say in his return.

Now, to say that the plaintiff is bound by the return because he is a privy, and that he is a privy because the return says that he is such, is the same circular reasoning which is condemned in *Rape v. Heaton, supra.*

While the rule is that parties and privies are bound by the return, the question as to whether a given person is in fact a privy must be open to investigation, upon the same reasoning that holds that the question of jurisdiction is open.

Some exceptions were taken to the charge of the court upon the question as to what acts were necessary to constitute a valid levy. We have examined the charge, and think that it is substantially correct upon the question. It does not seem necessary to insert the charge here.

By the Court.—Judgment affirmed.

DODGE, J., dissents.

BIGELOW, by guardian *ad litem*, Respondent, vs. DANIELSON, Appellant.

February 27—March 14, 1899.

102 470
d104 315
d104 317
102 470
d106 618
102 470
107 257
107 582
108 262
102 470
110 [1]494
110 [1]495
102 470
112 [2] 59

Master and servant: Personal injuries: Negligence: Special verdict: Instructions to jury: Proximate cause: Contributory negligence.

1. Questions submitted for a special verdict should be such that the jury will determine the substantial issuable facts and not the conclusions to be derived therefrom; and the refusal to submit such questions when requested is error, if in lieu thereof the court submits only a question calling for a conclusion, the answer to which leaves the party unadvised as to the real facts upon which the jury's conclusion is based. So *held* in an action for personal injuries where an employer's neglect of several distinct duties to his employee was in issue and the court submitted only the general question, Was the injury proximately caused by defendant's negligence?
2. An instruction in such a case that "proximate cause means the nearest cause; direct or immediate cause, in contradistinction to the indirect or remote cause," is erroneous.

3. An intelligent boy, fifteen years old, familiar with the operation of a machine of which he had charge in a pulp mill, with nothing to distract his attention, in attempting to straighten a wrinkle in a strip of felt running between rollers grasped the felt so near to the rollers that they caught and crushed his fingers. *Held*, that the danger was obvious and the boy guilty of contributory negligence.
4. A question in the special verdict, "Was the want of ordinary care and prudence on the part of the plaintiff the proximate cause of his injury?" was objectionable, the real inquiry being, Did such want of ordinary care and prudence *contribute* to produce the injury?

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action for personal injuries alleged to have been caused by defendant's negligence. Plaintiff was a minor, a little less than fifteen years of age. At the time of his injury he was employed to work in defendant's pulp mill. His duties were "skinning the roll" of pulp on a wet machine. The machine consisted of a series of eight wood and iron rolls besides the cylinder and crusher, between which ran an endless strip of wool felt, and upon which the pulp was collected. When the pulp became of the requisite thickness, it was his duty to remove the same in sheets, which he did by the use of a stick provided for that purpose. It was also his duty to see that the felt ran over the rolls properly, which was done by the adjustment of a guide roll. At times the felt would become wrinkled in places, and it became necessary to straighten it, taking hold and pulling with the hands. On the day of the accident the felt on this machine became somewhat wrinkled, and plaintiff stepped to a point where the felt feeds between the press rolls, and attempted to straighten it. In so doing he allowed the fingers of his left hand to be drawn between the rolls. The third and fourth fingers and a portion of the second were so crushed that they had to be taken off. The negligence complained of was that the plaintiff was inexperienced, and had not

been informed as to the danger attending his work; that the felt was worn and unfit for use; that the floor of the mill was slippery and icy; that there was a lack of cross-pieces over the felt to prevent the hands from entering the press rolls; and that he was left in charge of the machine night and day, so that he could not secure needed rest. The defendant denied negligence, and alleged that plaintiff, when injured, was at a place where it was unnecessary and improper for him to be, and that his accident was the result of his own carelessness.

A special verdict, with answers found by the jury, is as follows: "(1) Was the injury to plaintiff proximately caused by the defendant's negligence? *A.* Yes. (2) Was the danger apparent to a person of the age, experience, and understanding of the plaintiff? *A.* No. (3) Ought the plaintiff, in the exercise of ordinary care and prudence, to have comprehended and appreciated the risk and dangers incident to taking hold of the felt at the place and in the position where he did? *A.* No. (4) Was the want of ordinary care and prudence on the part of the plaintiff the proximate cause of his injury? *A.* No. (5) If the court shall be of the opinion that the plaintiff is entitled to recover, at what sum do you assess the plaintiff's damages? *A.* $500.00." A judgment was entered for plaintiff, from which this appeal is taken.

J. C. Kerwin, for the appellant.

For the respondent the cause was submitted on the brief of *Cate, Sanborn, Lamoreux & Park.*

BARDEEN, J. An inspection of the complaint shows that the issuable facts as to defendant's neglect may be stated as follows: That plaintiff was inexperienced as to his duties, and that defendant failed and neglected to instruct or inform him as to the dangers pertaining to his work; that defendant neglected to furnish sufficient help to operate his pulp

mill; that defendant failed to furnish the plaintiff a safe place to work, but allowed the floor of the mill to become covered with ice, so that it was slippery and unsafe; and that the felt upon which the pulp was gathered was worn and unfit for use. These allegations of negligence were put in issue by the defendant's answer, and covered the substantial, issuable facts concerning which proof was offered. When a special verdict was demanded, it became the duty of the court to submit these matters to the jury in such form that they might determine the *facts* so presented, and not the conclusions to be derived therefrom. "A special verdict is that by which the jury find the facts only, leaving the judgment to the court." Stats. 1898, secs. 2857, 2858; *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348. Too much emphasis cannot be laid upon this requirement. We are not concerned in the policy of the law which allows a special verdict. It is sufficient for our purpose that the law is so written, and it becomes our duty to see that it is carried out by trial judges in accordance with its true spirit and purpose. This court has had occasion, very recently, to criticise and condemn a verdict similar to the one submitted in this case. *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352. It was there said that it amounted to little more than submitting a general verdict in sections, a practice not at all in conformity to legal requirements. The true office of a special verdict is to single out the issuable facts of the case upon which the defendant's obligation rests. The questions should be so framed as to present, in as clear and sharp a way as possible, the real issues concerning which proof is offered, so that, when determined by the jury, the court may apply the law and render judgment accordingly. In this case, instead of directing the jury's attention, by proper questions, to the contested questions of negligence, the court submits an omnibus conclusion, the answer to which leaves the defendant unadvised as to the real fact of negligence upon which the jury's conclu-

sion is based. We do not desire to be understood as holding that the submission of a question of this kind would be error if no other questions were requested, but, where proper questions are requested and refused, we hold such refusal to be error. Trial courts are not always to blame for the imperfections of special verdicts. The practice by attorneys of submitting a long list of questions calling for the determination of mere evidentiary matters is very common, and ought to be condemned. It is more confusing than helpful to the court, and not infrequently leads to confusion and error.

In this case, counsel for defendant asked the court to submit twenty-one different questions, only a very few of which were applicable to the case or proper to be given. There are, however, several questions relating to defendant's negligence, and bearing upon the controverted facts, which the court ought to have submitted. One related to the fact of whether plaintiff had been cautioned or warned not to attempt to straighten the felt just before it reached the press rollers. Another related to the defective character of the felt. Others were sufficient to suggest to the court the actual facts in controversy, and all of which the court refused to submit. The only question in the verdict bearing upon defendant's negligence is as follows: "Was the injury to plaintiff proximately caused by defendant's negligence?" It requires but a glance to discover that it is susceptible to the criticism heretofore suggested. The form is not to be approved, and its harmful character was heightened by the court's instruction. He tells the jury that "proximate cause means the nearest cause; direct or immediate cause, in contradistinction to the indirect or remote cause." Applying this instruction to the question submitted, it requires no argument to demonstrate the faulty and harmful character of both questions and instruction. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279.

The jury found, in answer to questions 2 and 3, that the

danger of operating the machine was not apparent to a person of the age, experience, and understanding of plaintiff, and that he ought not to have comprehended the danger incident to taking hold of the felt as he did. Can these findings be sustained?

The evidence shows that the plaintiff was a bright, intelligent boy; that he had worked at this identical machine several months continuously during the year previous to his injury; that he had been at work on the same machine from some time in November to the last day of January, the day he was hurt. He had watched others handle the machine, and had learned how to handle the guide roller and to operate the machine. He said he was anxious to learn how to operate the machine, and had had control of the guide roll for a month or more before the accident happened. The dangers of operating the machine were apparent at a glance. There is no pretense or claim that the precise danger to which plaintiff exposed himself was hidden, or that his attention was distracted, or that any cause intervened or contributed to the risk. The allegation in the complaint that the floor was icy, and that plaintiff slipped, causing his hand to be caught between the roll, is not supported by a single fact testified to in the case. It is true the plaintiff says that he was not warned of the danger of getting his hands in the rolls, and that he did not understand or know there was danger of his getting hurt. There was nothing complicated or hidden in the act he was about to perform. The machine was in plain sight before him. The moving felt was being fed between the rolls, in plain sight, and right before his eyes. No warning that could have been given him could have made the danger of getting his fingers between the rolls more evident. The danger was so plain and obvious from the situation that affirmative proof of the fact was unnecessary. With nothing to distract his attention, with the danger visible before him, for him to grasp the felt in such

proximity to the rolls as to permit them to catch his fingers was an act of carelessness that cannot be reconciled with ordinary care. A discussion of a very similar situation in the recent case of *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615, covers the ground so fully that we need not proceed further. Upon the evidence produced, we are clearly of the opinion that the finding of the jury cannot be sustained.

The sixth question in the special verdict, which reads, "Was the want of ordinary care and prudence on the part of the plaintiff the proximate cause of his injury?" is objectionable. The real inquiry is, Did such want of care and prudence *contribute* to produce the injury? The form of this question, taken in connection with the definition given the jury of proximate cause, must have left the jury in great confusion.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

INGERSOLL, Respondent, vs. SEATOFT, Appellant.

102 476
111 55

February 27—March 14, 1899.

Vacating judgment: Rights of surety on appeal bond.

A surety upon an appeal bond conditioned for the payment of any judgment finally recovered against his principal is not entitled, in the absence of fraud or collusion, to have a judgment against his principal vacated and to have permission to defend, where his principal would have no such right.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

J. C. Kerwin, for the appellant.

For the respondent there was a brief by *Thompson, Harshaw & Thompson*, and oral argument by *J. C. Thompson.*

CASSODAY, C. J. It appears from the record, in effect, that the plaintiff commenced this action against the Ingersoll Land & Lumber Company, in April 1895, to recover a balance of account for services as general manager of the corporation; that the corporation answered; that the case was twice continued at the request of the corporation; that an amended answer was filed on leave had, and a counterclaim made therein for rent, wrong, fraud, negligence, and malfeasance upon the plaintiff's part, as the corporation's officer, and judgment demanded for a large sum against the plaintiff; that plaintiff replied; that the defendant moved to have the same made more definite and certain, which motion was overruled January 2, 1897; that the corporation appealed therefrom to this court, and upon such appeal the corporation was required to give, and did give, the requisite undertaking, with Henry Sherry and this appellant as sureties, whereby, pursuant to the statute in such case made and provided, they did undertake that the corporation would pay all costs and damages which might be awarded against it on such appeal, not exceeding $250, and did also undertake that, if the plaintiff finally recovered judgment against it in that action, then that it would pay the amount directed to be paid by such final judgment, not exceeding $1,000; that such appeal was dismissed on motion of the plaintiff's attorney, and the cause remanded and noticed for trial at the December term, 1897; that prior to that time the plaintiff, Henry Sherry, and the corporation, had become insolvent, and the corporation and Henry Sherry had each made voluntary assignments for the benefit of their creditors; that the plaintiff and the corporation respectively waived a jury trial, and in open court, February 14, 1898, agreed to, and the court set the cause down for, trial March 29, 1898.

It further appears that March 16, 1898, the corporation's attorneys, having determined that it was unwise to defend the action or prosecute the counterclaim, wrote to the ap-

pellant that the case would be reached for trial late in March, 1898, and asked what action he would take with reference to the trial; that the appellant thereupon consulted his attorney and directed him to protect his interest; that his attorney was informed that the case would not be taken up until some time in April, 1898; that, without the knowledge of this appellant or his attorney, the corporation, through its attorneys, March 29, 1898, withdrew its counterclaim and suffered judgment to be taken against the corporation for $280 damages, together with costs; that July 5, 1398, the attorneys for the corporation consented in writing that this appellant be, and he thereby was, authorized to appear in the name of the corporation in this action or otherwise, and open such judgment, and defend the action, and take such proceedings in that regard as he might think fit or as might be ordered by the court, at his own expense; that the appellant thereupon prepared his petition, verified July 5, 1898, excusing his neglect and claiming a good defense upon the merits, and July 8, 1898, upon such consent and petition and affidavits of himself and his attorney and Benjamin Hooper, J. W. Cameron, and Henry Sherry, obtained an order to show cause why the judgment so entered should not be set aside and vacated and this appellant permitted to defend; that upon the hearing of that application counter affidavits of the plaintiff and his several attorneys and agents were read, and the motion was finally determined October 11, 1898, when the court ordered that petitioner's motion to open and vacate the judgment, and for permission to defend the action, be, and the same was thereby, denied, with $10 costs, and that the order theretofore granted therein staying proceedings be, and the same was thereby, vacated.

From that order the petitioner, *Seatoft*, appeals.

It is conceded that the court denied the application to open the judgment on the ground that, in the absence of

fraud or collusion, the surety, *Seatoft*, would have had no right to open the judgment where the principal would not have such right, and that in this case there could be no doubt that the principal would have had no standing in court for such a motion.

We all fully concur in the ruling of the trial court. The cause had been pending about three years before the judgment was entered. The appeal on which the undertaking was given was from an order refusing to make the plaintiff's reply to the corporation's counterclaim more definite and certain. That undertaking, so signed by this appellant and Henry Sherry, was an absolute agreement in this same action to pay all costs and damages which might be awarded against the corporation on such appeal, and also the amount of any final judgment which the plaintiff might recover therein, not exceeding $1,000. The corporation and Henry Sherry respectively failed and made an assignment for the benefit of their creditors more than four months prior to the entry of the judgment in question. It is admitted that the plaintiff was also insolvent, and that, twelve days prior to the entry of that judgment, the attorneys for the corporation in this action notified the appellant that, under the circumstances, they deemed it unwise to defend the action or prosecute the counterclaim. Such being the facts, it is manifest that there was no fraud or collusion in allowing judgment to be entered as it was; and it is equally manifest that the corporation was in no position to have such judgment vacated. The statutes requiring undertakings to be given upon appeals are remedial, and should be liberally construed to effect their object. *Sutro v. Bigelow*, 31 Wis. 527; *Smith v. Lockwood*, 34 Wis. 72. This court has expressly held that "where a surety has contracted with reference to the conduct of one of the parties to a suit or proceeding in court, he is concluded by the judgment therein." *Shepard v. Pebbles*, 38 Wis. 373. The same principle has been frequently sanctioned by this

court. So this court has recently held that, "in the absence of fraud or collusion, the sureties on a probate bond are concluded by the decree of the proper court, rendered upon an accounting of their principal, as to the amount of their principal's liability, even though they were not parties to such accounting." *Meyer v. Barth*, 97 Wis. 352, 355, and cases there cited. See, also, *Roberts v. Weadock*, 98 Wis. 405; *Krall v. Libbey*, 53 Wis. 292. The same principle is applicable to this case. Further discussion is unnecessary.

By the Court.—The order of the circuit court is affirmed.

BANDELL, Respondent, vs. JELLEFF and another, imp., Appellants.

February 27—March 14, 1899.

Findings of fact: Appeal: Notice of fraud.

In an action to set aside deeds on the ground of fraud, a finding of the trial court that purchasers from plaintiff's grantee took title with notice of facts and circumstances sufficient to put them upon inquiry, which would have led them to discover the fraud of their grantor in obtaining title from the plaintiff, is *held* to be an inference of fact from various items of evidence, and not a conclusion of law. It will therefore not be disturbed unless the evidence preponderates against it.

APPEAL from a judgment of the circuit court for Green Lake county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action to set aside and annul a deed from the plaintiff to the defendants William M. Bandell and wife, and also a deed from said Bandell and wife to the defendants *Jelleff* and *Wakefield*, on the ground that said Bandell procured his deed by a fraud upon plaintiff and that his grantees took title with knowledge of such fraud.

The trial court, among others, made the following find-

ing of fact: "(21) That at the time of the execution and delivery to said *Jelleff* and *Wakefield*, by said William M. Bandell and wife, on said 3d day of April, 1897 (said deed being the deed described as Exhibit B of the complaint), they, the said *Jelleff* and *Wakefield*, had notice of facts and circumstances sufficient to put them upon inquiry, which inquiry would have led them to discover the fraud of said William M. Bandell in procuring said deed from plaintiff on the 16th day of January, 1896 (being said Exhibit A of the complaint), and to discover the fraudulent intent of the said William M. Bandell in executing to them, said *Jelleff* and *Wakefield*, said deed of said lands, viz. said deed described as Exhibit B of the complaint."

The defendants *Jelleff* and *Wakefield* appealed from a judgment in favor of the plaintiff.

For the appellants there was a brief by *Thompson, Harshaw & Thompson*, and oral argument by *J. C. Thompson.*

For the respondent there was a brief by *R. F. Hamilton*, attorney, and *Perry Niskern*, of counsel, and oral argument by *Mr. Hamilton.*

DODGE, J. An examination of the evidence discloses no preponderance against the findings of fact, by which, among other things, it is found that the defendants took title with notice of facts and circumstances sufficient to put them upon inquiry, which would have led them to discover the fraud of their grantor in obtaining title from the plaintiff. This is not, as contended by appellants, a conclusion of law, but an inference of fact from various items of evidence. Its effect is to deny the appellants the protection equity might accord to an innocent purchaser for value, and they are not entitled to reimbursement of the small amount of money paid by them to their grantor, no part of which came to the hands of the plaintiff. *Rindskopf v. Myers*, 87 Wis. 80.

By the Court.—Judgment affirmed.

102 482
117 404

SWEET, DEMPSTER & COMPANY, Appellant, vs. NEFF and others, Garnishees, Respondents.

February 27 — March 14, 1899.

Voluntary assignment: Chattel mortgages.

1. A conveyance or other arrangement by which an insolvent debtor places part or all of his property under the control of another, whether a creditor or not, in trust for the benefit of one or more of his creditors, with or without preferences, constitutes an assignment for the benefit of creditors and is voidable at the election of any creditor not consenting thereto, unless the statutory requisites for the making of voluntary assignments be complied with.
2. Where separate mortgages of the property of an insolvent debtor were given at the same time to several creditors, with an agreement or understanding, evidenced by the writings and by the conduct of the parties, that the first mortgagee should take immediate possession for the benefit of all, convert the property into money, and account therefor to the other mortgagees or their mutual agent, the transaction is *held* to have constituted a voluntary assignment. *Menzesheimer v. Kennedy*, 75 Wis. 411, and *Michelstetter v. Weiner*, 82 Wis. 298, distinguished.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

August 27, 1897, the principal defendants were insolvent merchants having on hand a stock in trade and some store fixtures of the value of some over $2,000 and about $500 in book accounts. Among the creditors of such defendants were plaintiff and the mortgagees hereinafter mentioned. Such mortgagees, each acting independently of the other and knowing of the insolvent condition of such defendants, gave his or its claim to M. H. Eaton, an attorney at law, with instructions to collect or secure it. After receiving such claims, the attorney demanded payment or security, in accordance with his instructions from the creditors. Such defendants thereupon gave such creditors mortgages upon their entire property, each being in form independent of the others. All

the mortgages were made at the same time, in the same place, and in the order the claims were received by the attorney. The first mortgage was given to *W. W. Neff* for $550. That was followed by others in the following order: *E. H. Hicks*, $300; *Commercial Bank of Oshkosh*, $175; *German American Bank of Oshkosh*, $175; *South Side Exchange Bank of Oshkosh*, $240; *Frank A. Leach*, $150.26. The last mortgage covered the book accounts as well as the stock. Each mortgage contained a provision as follows:

"It is further understood and agreed between the parties hereto that for further security the said —— —— shall take, and does take, the actual and full possession of said property and every part thereof, so as to be and become the mortgagee in possession, and it is further agreed that all proceeds derived by said second party from sales of any of said property shall be applied to the payment of the aforesaid notes, and said second party shall well and truly account for all money received by him from such sales."

All of the mortgages were filed by the attorney in the office of the city clerk at the same time, but in the order in which they were made. The attorney handled the matter for all of the creditors named, drew the mortgages, obtained the signatures thereto, placed the same on file, obtained certified copies of them preparatory to taking possession of the property, and delivered to *Neff* his copy, who immediately took possession of such property, and that was speedily followed by a taking possession by the attorney for the other mortgagees in their order. Thereafter, *Neff* sold sufficient of the property to more than cover his claim, then accounted to Eaton, the attorney, as agent for the other mortgagees, who then took absolute control of the property and continued the conversion of the same into money till the whole business was closed out. The mortgagee *Leach* asserted a right in the meantime to control the book accounts, and made some collections thereon.

After the mortgages were made, and *Neff* had taken possession of the property, and Attorney Eaton had asserted possession thereto subject to the rights of *Neff*, plaintiff commenced an action to recover its claim against the principal defendants, and this garnishee proceeding, summoning all the mortgagees as garnishees. Such garnishees answered separately, putting in issue the claim of the plaintiff as to the invalidity of such mortgages. On the trial the evidence established the *bona fides* of the indebtedness secured by the mortgages, and established the facts substantially as before indicated. There was considerable direct evidence that the mortgages were taken for no other purpose than to recover the indebtedness secured thereby from the principal defendants. The court found the facts as indicated; that the several mortgages were separate and distinct transactions; that there was no concert of action between the mortgagees; that *Neff* acted solely for himself in taking possession of and selling the mortgaged property; and that the mortgages were all valid and the garnishees not liable. Judgment was entered accordingly.

For the appellant there were separate briefs by *Felker, Stewart & McDonald*, attorneys, and *Thompson, Harshaw & Thompson*, of counsel, and oral argument by *F. C. Stewart* and *J. C. Thompson*.

For the respondents there was a brief by *Eaton & Weed*, and oral argument by *H. I. Weed*. To the point that the mortgages, being taken in good faith to secure honest debts, were valid and to be enforced, they cited *Bleiler v. Moore*, 94 Wis. 385; *Koch v. Peters*, 97 Wis. 492; *H. B. Claflin Co. v. Grashorn*, 99 Wis. 356.

MARSHALL, J. The question for decision on this appeal is: Did the mortgages given by Davis & Buckstaff to the garnishee defendants, under the circumstances, constitute an assignment for the benefit of creditors within the decisions

of this court in *Winner v. Hoyt*, 66 Wis. 227; *Strong v. Kalk*, 91 Wis. 29; *Jameson v. Maxcy*, 91 Wis. 563; *Collins v. Corwith*, 94 Wis. 514, and similar cases? The principles of law governing the subject are too well known to require any discussion here. It is the established doctrine that if an insolvent debtor make a conveyance to, or by any arrangement place his property under the control of, another, whether such other be a creditor or not, or whether all the debtor's property be so placed or not, for the benefit of one or more of his creditors, with or without preferences, it constitutes an assignment for the benefit of creditors and is voidable at the election of any creditor not consenting thereto unless the statutory requisites for the making of assignments for the benefit of creditors be complied with. In short, if the transaction combine the elements of assignor, trustee, trust, creditors, and *cestui que trust* who can compel the enforcement of the trust, so that all the common-law requisites of an assignment for the benefit of creditors are present, it will fail at the option of any creditor who may properly challenge its validity, if any material statutory requirement on the subject be violated.

The learned trial court said the facts here do not bring the case within the principles of law above referred to, resting his conclusion largely on *Menzesheimer v. Kennedy*, 75 Wis. 411, and *Michelstetter v. Weiner*, 82 Wis. 298. The former case does not seem to apply. There were two mortgages each given independently of the other to a creditor, without any agreement between the two creditors, or either of them, and the mortgagor to take possession of the property as trustee. Here there was unquestionably an understanding that the property should immediately pass into the possession of the first mortgagee for conversion into money and distribution thereof in the order of the priority of the various mortgages. It in effect so states in the instruments, and the conduct of all the parties is consistent with that view and with no other. The latter case cited does not

seem to have any application to the facts here. The decision turned on the finding that the transfer of the property was absolute, in payment of a debt owing to the vendee and in consideration of his agreeing to pay off the other debts which were secured on the property transferred. The vendee in that case did not become a trustee for the other two creditors, but became their debtor. The essential elements of an assignment for the benefit of creditors did not exist. There was no absolute conveyance of property in this case, and no similarity between the two cases that we can perceive.

If *Neff* became, by agreement of the parties, a trustee for the subsequent mortgagees, then it must be admitted that all the elements of an assignment for the benefit of creditors entered into the transactions which resulted in giving him that status. There were the assignors, Davis & Buckstaff, the assignee or trustee, *Neff*, the trust reposed in him by virtue of his situation, the *cestuis que trust*, the other creditors who could enforce the trust. If we were left to determine just what the agreement was between Eaton, the attorney who represented all the creditors, and *Neff*, the first mortgagee, and the debtors, by the circumstances of the transaction, some difficulty might be met with in determining the true situation. But we are not so left. In the *Neff* mortgage, as well as in all the others, in addition to the usual clause obligating the mortgagee to turn over to the mortgagor any surplus arising from the property over and above the mortgage debt, in case of conversion of the property into money by the mortgagee, there was added the significant clause obliging *Neff* to take immediate possession of the property and account for all sales. That clearly contemplated, not only possession of the property by *Neff*, but a sale thereof by him and accounting, not to the mortgagor, but to the subsequent mortgagees. True, he had authority, probably, to sell at retail, and after receiv-

ing sufficient to satisfy his own claim to turn the balance of the property over to the other mortgage creditors in the order of their priority, or to Eaton as their mutual agent. But it is quite clear that such was not the original scheme. The parties contemplated an immediate sale of the entire property and an accounting for the proceeds to the other mortgagees or to Eaton for them.

If there was no other purpose in the making of the instruments than to secure *Neff*, the peculiar clause referred to was entirely unnecessary. In connection with the fact that all the mortgages were made at the same time, drawn and filed by the same attorney, and that *Neff* by the instructions of such attorney took possession of the property and was then notified by the latter that he claimed the right thereto, representing the other creditors, subject to the former's claim, it is quite clear that the purpose of the added clause was for *Neff* to take such possession and account for his doings to the subsequent incumbrancers. That the purpose was as indicated is clearly borne out by the fact that *Neff* did not at first endeavor to sell sufficient of the property to pay his own claim. His first effort was to sell in bulk. It was only upon his failing to obtain a satisfactory offer that way that he proceeded to sell at retail.

So the agreement, as evidenced by the writings and what occurred pursuant thereto, appears to have been that *Neff* should take possession of the entire property for the benefit of himself and all subsequent mortgagees, and account to them for his handling thereof; that he should sell the whole in bulk and dispose of the fund realized by satisfying his own claim and turning the balance over to the subsequent mortgagees in the order of their priority, or to Eaton as their agent, for distribution. The understanding probably was, too, that if a sale could not be made of the property as a whole, *Neff* should sell at retail, accounting for all sales to Eaton or to the creditors represented by him, he having the

right to take possession after *Neff's* claim was satisfied. In either case, *Neff* became a trustee in possession for the other creditors. If the mortgages were separate, independent transactions, and *Neff's* liability to answer to subsequent mortgagees merely the legal result of the situation, the case would be different. But there was something more than a liability by operation of law. There was a written agreement to take possession of the property and to account for all sales, which, as before indicated, clearly meant account to the other mortgagees. That, with the concert of action in the whole transaction, is consistent with no other reasonable theory than that *Neff's* possession of the property was by mutual agreement for the benefit of all the mortgagees in the order of their priority. He became obligated by such agreement to answer to them as trustee, and they became his *cestuis que trust*, who could have enforced the trust thus created. Of that there can be no reasonable controversy when the whole situation is viewed properly.

If we should sustain the judgment appealed from, a way would have been discovered at last, after many futile efforts in that direction, to make an assignment for the benefit of creditors without complying with the statutes of this state on the subject, and to secure at the same time a preference of some creditors over others. The sole requisite would be, several mortgages made to favored creditors, with an agreement obligating the first mortgagee to take immediate possession of the property and account for it to the subsequent mortgagees or to their mutual agent. By that means the legislative policy of the state, that creditors shall share equally the assets of their insolvent debtor in case of a trust thereof for their benefit, and that the trust shall be created with such safeguards as to secure its honest and faithful administration, would be most effectually defeated. In our judgment this case, on the facts, comes clearly within the condemnation of the statutes on the subject of assignments

for the benefit of creditors, and previous adjudications of this court.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to this opinion.

WHITE, Respondent, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

February 27 — March 14, 1899.

Railroads: Injury at highway crossing: Contributory negligence.

1. In all cases where the right of recovery is based upon negligence not wilful nor such that the person injured was deceived or misled by the negligent act complained of, the plaintiff, in order to recover, must himself have exercised care, no matter how clear the negligence of the defendant.
2. The duty of a person approaching a railway track to look and listen before crossing is absolute, and nonobservance of that duty is negligence *per se*. So *held*, in a case where the gates maintained at a railway crossing were open, and plaintiff, while walking across the tracks, was struck by a train running at an unlawful rate of speed, which he might have seen and heard if he had looked and listened before attempting to cross. *Rohde v. C. & N. W. R. Co.* 86 Wis. 309, distinguished.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Action for personal injury. Defendant operates its railway through the city of Neenah, and across Commercial street. The railroad tracks run north and south, and Commercial street in a northeasterly and southwesterly direction, and at the point of intersection the northeast angle is 43° 50′. The street is crossed by four tracks, the main track being to the west. Next easterly is the passing track, the distance from center to center, perpendicularly, being about

thirteen feet, from rail to rail about eight feet, and along the sidewalk about twelve feet. Still further east, in succession, are what are known as the storage and warehouse tracks. From the center of the main track to the center of the storage track, along Commercial street, the distance is a little more than twenty-one and one-half feet, and to the center of the warehouse track ninety-nine feet. Defendant's depot is immediately north of Commercial street, and west of the main track, and consists of a baggage room, depot, and express room, under one roof. The distance from the north side of the north sidewalk at the main track up the track to a point opposite the southeast corner of the baggage room is 132 feet 6 inches, and opposite the same corner of the depot, 192 feet 6 inches. Gates were maintained by the defendant at this crossing, and were operated from 7 o'clock in the forenoon until the passing of the trains which met there and were due at 7:37 in the evening.

Plaintiff was injured about 8:30 in the evening of February 9, 1897. He lived in Neenah. He spent the early part of the evening in Menasha, and was returning home, walking on the north sidewalk of Commercial street towards the west. While passing over the main track, he was run into by one of defendant's freight trains, and severely injured. The negligence of defendant concerning which proof was offered consisted in failure to operate the gates, blocking of the sidewalk by cars left on the tracks east of the main track, and running its train at a dangerous rate of speed over the crossing, without signal or warning. Defendant admitted that the gates were not operated, but denied the other allegations of negligence.

The jury found by a special verdict that the defendant was guilty of negligence which was the proximate cause of plaintiff's injury; that the plaintiff was without fault; that the bell of the locomotive was ringing continuously as the train approached and passed over the crossing; that the speed of

the train was eighteen miles per hour,—and assessed the plaintiff's damages at $5,500. The court refused to direct a verdict for defendant, and refused to set aside the verdict rendered, but ordered judgment for the plaintiff. From the judgment so entered this appeal is taken.

For the appellant there was a brief by *Fish, Cary, Upham & Black*, and oral argument by *John T. Fish.*

For the respondent there was a brief by *Eaton & Weed* and *Henry Fitzgibbon*, and oral argument by *H. I. Weed.* To the point that the open gates were notice of a clear track and that it was safe to cross without taking the precautions usually required to discover approaching trains, and that negligence is not imputed to one who acts upon that assurance, they cited *Hooper v. B. & M. R. R.* 81 Me. 260; *Glushing v. Sharp*, 96 N. Y. 676; *Ernst v. H. R. R. Co.* 35 N. Y. 9; *Lindeman v. N. Y. O. & H. R. R. Co.* 42 Hun, 306; *Palmer v. N. Y. C. & H. R. R. Co.* 112 N. Y. 234; *Tyler v. N. Y. & N. E. R. Co.* 137 Mass. 238; *Pennsylvania R. Co. v. Matthews*, 36 N. J. Law, 533; *Lake Shore & M. S. R. Co. v. Frantz*, 127 Pa. St. 297; *Railway Co. v. Schneider*, 45 Ohio St. 678; *Richmond v. C. & W. M. R. Co.* 87 Mich. 374; *Evans v. L. S. & M. S. R. Co.* 88 Mich. 442; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305; *Pittsburgh, C. & St. L. R. Co. v. Yundt*, 78 Ind. 373; *Chicago, St. L. & P. R. Co. v. Hutchinson*, 120 Ill. 587; *Central P. R. Co. v. Kuhn*, 86 Ky. 578; *Abbett v. C., M. & St. P. R. Co.* 30 Minn. 482; *Central Trust Co. v. W., St. L. & P. R. Co.* 27 Fed. Rep. 159; *Burns v. North Chicago R. M. Co.* 65 Wis. 312; *Rohde v. C. & N. W. R. Co.* 86 Wis. 309.

BARDEEN, J. We are urged to reverse this judgment on the ground that the plaintiff's evidence, with the finding of the jury, shows that he was guilty of negligence that will preclude a recovery. The same contention was addressed to the trial judge, and denied on grounds hereinafter referred

to. It is admitted that proper gates were maintained at the crossing where plaintiff was injured, and that they were not operated at the time of the injury. It must also be assumed that the several tracks referred to in the statement of facts were incumbered with cars, the car on the passing track being close to or partly over the sidewalk on the north side of Commercial street, and that, as the jury has found, defendant's train approached the crossing at the rate of eighteen miles per hour. It must also be assumed that the headlight in defendant's locomotive was lighted; that the bell was rung continuously as the train approached the crossing; and that the measurements as stated are substantially correct. The plaintiff was a man about fifty-five years of age, possessed of all his faculties. He had lived within a few hundred feet of this crossing for a year and a half, and was somewhat familiar with the surroundings and conditions. He approached the crossing on foot from the east. We will give the circumstances of the accident in his own language:

"When I approached the tracks, I see the gates were up, and cars standing on the side track, warehouse track, and I walked on, looking both ways. I supposed everything was clear, and I walked on and looked both ways, and I see nothing and heard nothing, and when I got to the main track I stopped and looked around the corner north towards the depot. I looked north around the edge of the car. I didn't walk around the car. I stood and looked north, and could see down as far as the depot, one corner of it, and moved up and looked south; and I took three or four steps, and my foot slipped, and I was struck. When I stopped at the corner of the car, I looked for approaching trains, but didn't see a train coming nor hear the bell of an engine rung."

This was about half past eight in the evening of February 9th. The headlight of the locomotive was burning, and the jury found that the bell was ringing. The moment he passed the car on the passing track, if there was a car at that point,

the view north for 1,600 feet was clear and unobstructed. If the train was near enough to strike him, as he said it did, it must have been in plain sight. There can be no gainsaying this fact. It is fixed by the uncontroverted testimony. The wind was blowing southeast, and would naturally carry the noise of the approaching train and the sound of the ringing bell somewhat in his direction. There was nothing to distract his attention or prevent him using his senses. He says he looked but saw no train and heard no bell. One of two conclusions is certain,—either that he did not look and listen, or, if he did look and listen, he did not heed what he saw and heard. The law presumes that he saw what he could have seen if he had looked, and heard what he could have heard if he had listened. *Cawley v. La Crosse City R. Co.* 101 Wis. 145. The presumption being that he saw and heard the approaching train while standing at a place where he was in perfect safety, the fact that he got on the track and was injured leads to the conclusion that he was heedless and careless. The duty to look and listen is absolute, and nonobservance of that duty is negligence *per se*. This is the rule of all of the authorities, many of which are cited in the opinion before referred to. No less certain and absolute is the duty to observe and heed the danger that is in sight. To a person approaching a railroad track on foot, the danger line is so narrow, and may be avoided with so little effort, that the law justly thrusts the obligation of exercising that effort upon him. If he fails to use common prudence, and is injured, he is without remedy. *Bohan v. M., L. S. & W. R. Co.* 61 Wis. 391; *Hansen v. C., M. & St. P. R. Co.* 83 Wis. 631; *Schmolze v. C., M. & St. P. R. Co.* 83 Wis. 659; *Schlimgen v. C., M. & St. P. R. Co.* 90 Wis. 186; *Nolan v. M., L. S. & W. R. Co.* 91 Wis. 16; *McCadden v. Abbot*, 92 Wis. 551.

In a written opinion denying the defendant's motion for a new trial, the trial judge laid much stress on the case of *Rohde v. C. & N. W. R. Co.* 86 Wis. 309, wherein it was said: "The open gate was an assurance to the public that there

was no danger, and an invitation to cross in safety." This was said in a case where the gates were not lowered, and plaintiff, relying thereon, drove his team in such proximity to the track that they became frightened by a passing train, and ran away. But suppose, while in a place of safety, plaintiff in that case had seen, or could have seen by the use of ordinary care, that the train was approaching, would any one claim that he might nevertheless continue his way and drive into danger? The paramount duty of the traveler is to use ordinary care, and this obligation is none the less absolute even though the other party is guilty of negligence. It is only when the traveler is lulled into security in reliance upon the negligent act, and is drawn into danger that he could not avoid by the exercise of ordinary care, that the obligation to respond in damages exists. The current of authorities in support of this rule is well-nigh universal. An extensive discussion and citation of authorities may be found in 3 Elliott, R. R. §§ 1165, 1166. Thus, in *Moore v. K. & W. R. Co.* 89 Iowa, 223, it is stated: "A traveler upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing in order to avoid a collision. This precaution is dictated by common prudence. He should listen for signals, and look in the different directions from which a train may come. If, by neglect of his duty, he suffers injury from a passing train, he cannot recover of the company, although it may itself be chargeable with negligence, or have failed to give the signals required by statute, or be running at the time at a speed exceeding the usual rate." It was further said, in substance, that although deceased had the right to act on the presumption that the usual warning signals for crossings would be given, yet he must use ordinary care to avoid danger; and, having had an opportunity to see the train and avoid the danger, no recovery could be had.

Upon the same subject, we quote from *Cadwallader v. L., N. A. & C. R. Co.* 128 Ind. 518: "Assuming in this case

that the appellant had the right to presume that no train was approaching, by reason of the failure of the flagman to give notice, yet this did not excuse her from the use of her senses of sight and hearing in order to ascertain the fact for herself. With the use of these senses she was as well able to ascertain whether a train was approaching as the flagman at the crossing, and a failure to use them was negligence."

In *Korrady v. L. S. & M. S. R. Co.* 131 Ind. 261, it is said: "It does not excuse one who attempts to cross in front of a locomotive which he sees approaching at no great distance that the speed is eighteen miles an hour at a place where a municipal ordinance limits it to ten miles an hour. The law is well settled that, where a train is seen approaching, it is contributory negligence to voluntarily attempt to cross the track upon the assumption that the speed is not greater than a municipal ordinance allows." An extract from the opinion in the case of *Railroad Co. v. Houston*, 95 U. S. 697, is as follows: "But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of possible danger. Had she used her senses she could not have failed both to hear and to see the train which was coming. If she omitted to use them and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others."

In *Berry v. Pennsylvania R. Co.* 48 N. J. Law, 141, the statement is made that the negligence of a flagman at a crossing will not excuse the traveler who attempts to cross

the track of a railroad from looking both ways and listening. He must not rely entirely upon the flagman. Chief Justice PAXSON lays down the rule in *Greenwood v. P., W. & B. R. Co.* 124 Pa. St. 572, as follows: "I do not understand the law to be that when a railroad company adopts safety gates or any other appliance for the protection of the public, that the public are thereby absolved from the duty of taking care of themselves. Conceding that the company was required to take extra precautions by reason of the gates being out of order, yet the plaintiff was also bound to do his part. He had no right to omit the ordinary precautions when approaching a railroad crossing merely because he finds the gates up. . . . In all such cases the safety of the traveling public requires that each party shall be held to the exercise of due care."

These are but a few of the cases holding substantially the same doctrine, and it is not, as asserted by the trial judge, peculiar to the state of Pennsylvania. The true rule, and the one we wish to be understood as sanctioning, is as laid down by 3 Elliott, R. R. § 1165: "In all cases where the right of recovery is based upon negligence, the rule supported by authority is that, in order to recover, the plaintiff must himself exercise care, and is not absolved from this duty, no matter how clear the negligence of the defendant." This rule, of course, does not apply to cases when the acts or conduct of the defendant are such as may justly be regarded as wilful, nor to its full extent to cases when the plaintiff is deceived or misled by the negligent act complained of. The plaintiff in this case cannot justly claim that he was led into a place of danger by the failure of the company to lower the gates. The noise of the train and the ringing of the bell were sufficient to apprise him of its approach. If he had used his eyes at all, he could have seen the train before he was struck. Failing to do so, his right to claim damages for his injury never ripened. He is the victim of

his own carelessness. *Freeman v. D., S. S. & A. R. Co.* 74 Mich. 86; *Gardner v. D., L. & N. R. Co.* 97 Mich. 240; *Clark v. N. P. R. Co.* 47 Minn. 380.

This view of the case renders it unnecessary to discuss the objections to the special verdict or the criticisms made to the charge.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

CROSS and others, Respondents, vs. BOWKER and others, imp., Appellants.

102 497
106 150
106 151

February 27 — March 14, 1899.

Equity: Setting aside conveyance: Laches.

An aged couple conveyed their entire property, a homestead of ten acres, to a married daughter, E., in consideration of an agreement on her part to support them during their lives and to support an unmarried daughter so long as she remained single,— all to reside upon the premises. The grantee resided on the land but a few months, and then moved away and ceased to support her parents and sister, who continued, however, to reside there until the father's death a year and a half later, no steps being taken to rescind the conveyance. Immediately after the father's death another daughter and her husband, J., moved upon the premises, and within a few months J. obtained a deed of the premises from E., expressing a consideration of $50. The mother and the unmarried daughter subsequently consented in writing to the conveyance to J. and to his assumption of the contract for support, and he continued thereafter to perform that contract to the satisfaction of the beneficiaries. No objection on the part of the other heirs was made until after the death of the mother about two years later. *Held,* that said heirs were guilty of such laches as would preclude them from asserting any right they might have had upon the death of their father to a rescission of the conveyance and a revesting of the title in his heirs.

APPEAL from a judgment of the county court of Winnebago county: C. D. CLEVELAND, Judge. *Reversed.*

Cyprian Bowker and Abigail, his wife, conveyed their homestead of ten acres, by warranty deed, to their married daughter, Ella Tice, with no consideration except a written agreement by Ella Tice with said grantors and *Ida Bowker*, their unmarried daughter, in which, in consideration of the conveyance of the described land, she "covenants and agrees to care for and support the said Cyprian Bowker and Abigail Bowker during the term of their lives, and to care for and support said *Ida Bowker*, daughter of said Cyprian and Abigail Bowker, during such time as she remains single." Residence of all parties was contracted to be upon the premises. The deed was recorded at once, and the contract on March 28, 1893. All parties resided on the premises from date of the deed, November 30, 1892, until the following April, when Ella Tice and her husband moved to Minnesota. The old people and *Ida* continued to reside on the premises until the father's death, November 8, 1894, whereupon, on November 15, 1894, defendant *Frank A. Jones*, husband of another daughter, and his wife, moved onto the premises, and from that time forward have resided there and furnished support to Abigail Bowker and *Ida*. Shortly afterwards, namely, in January, 1895, a warranty deed of the premises was made by Ella Tice and her husband to *Frank A. Jones*, for an expressed money consideration of $50; and, in November of that year, Abigail and *Ida Bowker* signed a written consent to such conveyance and to the assumption and performance of the support contract by *Frank Jones*. There is no definite proof that he expressly entered into such an agreement; but various items of evidence through the transactions indicate that that was the purpose and understanding upon which he moved to the premises upon the father's death. He then had knowledge of the existence and terms of that agreement, as well as that it had not been performed by Ella Tice.

There is no evidence of objection or complaint by any of the beneficiaries of that contract, either before Ella and her husband left the premises or afterwards; and no steps were taken at any time to rescind or set aside the conveyance, nor to insist upon performance of the contract. Abigail Bowker, the mother, after a lingering illness, died September 5, 1896. The ability of the father to work the lands and support his family therefrom is not disclosed. Cyprian Bowker died intestate, leaving no other property, and the plaintiffs are five of his children and heirs at law, while the defendants are the other three of his children, together with their husbands.

The action is to set aside the conveyance by Cyprian Bowker and wife to Ella Tice, and the conveyance by Ella Tice to *Frank A. Jones*, and for an accounting of rents and profits, on the ground that the agreement which constituted the sole consideration for the former conveyance had not been performed. The defendants *Ida Bowker* and *Frank A. Jones* and his wife answered. The other defendants did not appear. The trial court found in favor of the plaintiffs, and from a judgment setting aside the conveyances the above named defendants appeal.

F. W. Houghton, for the appellants.

For the respondents there was a brief by *Felker, Stewart & Felker*, and oral argument by *F. C. Stewart* and *C. W. Felker*.

DODGE, J. It is sharply contested in this case whether, upon the doctrine laid down in *Bogie v. Bogie*, 41 Wis. 209, and following cases, any cause of action in equity to set aside the deed and revest title in the parent grantor becomes so completely vested as to survive by virtue of sec. 4253, R. S. 1878, unless the grantor in his lifetime in some manner exercises his election to pursue that remedy rather than to enforce the contract for support by legal action, or to seek other redress inconsistent with the rescission of the convey-

ance. It is also a subject of controversy whether, if any such cause of action becomes so vested and survives, the survival is to the heirs or to administrators. We do not, however, in this case, find it necessary to decide either of these questions. We think the conduct of the plaintiffs is such as to preclude them from seeking from a court of equity the relief here demanded, namely, the entire rescission of the conveyance and revesting in the heirs at law of the title to the homestead thereby conveyed. It appears by the findings that since November, 1894, the present holder of the title, *Jones*, has been performing the contract for support to the satisfaction of its beneficiaries, and is still performing it; that such conduct has been open and notorious; and that such performance has been upon the faith of the conveyance of the land to him, and the assent thereto by the beneficiaries of the contract for support. The plaintiffs, if they desired to enforce a right to rescind the conveyance and take from both Ella Tice and the defendant *Jones* the land conveyed, could as well have acted in 1894 as at the present time. Inasmuch as this action addresses itself to the broadest of the equitable powers of the court, a form of relief resulting in such hardship to the defendant by reason of this delay on the part of the plaintiffs should not be accorded to them. Their delay until after the death of their mother, thereby subjecting the defendant to the burdens resulting from her support in her old age and last illness, has brought about such a situation that the relief prayed, even if otherwise equitable to them, would be inequitable to the defendant, and ought not to be granted. *Frederick v. Douglas Co.* 96 Wis. 415.

By the Court.— Judgment reversed, and cause remanded with directions to dismiss the complaint.

GIBSON, Appellant, vs. GIBSON and wife, Respondents.

102 501
s108 106

January 11 — April 4, 1899.

102 501
110 s388
f110 s384

Administrator's sale of land: His interest in the purchase: Void or voidable: Remedies: Ejectment.

1. A finding of the trial court that an administrator was not interested directly or indirectly in a sale of the land of his intestate is *held* to be against the preponderance of the evidence in this case, from which it appears, among other things, that the land was bid in at a fair price by the administrator's son, who is not shown to have had any means to pay for it; that before the sale was completed, in order to procure the discharge of mortgages then existing on the land to an amount equaling about three fourths of the purchase price, the administrator mortgaged his own land and joined with his son in giving notes secured by mortgage on a part of the land in question; that within two months after the sale was completed the son deeded to his father most of the unincumbered part of the land; and that the explanation of these transactions and the testimony as to how the son paid for the property are vague and unsatisfactory.
2. Under sec. 3914, Stats. 1898, providing that if an administrator is interested, directly or indirectly, in the purchase of land sold by him in his official capacity the sale shall be void, such a sale is not absolutely void, but voidable only, and until it is set aside in a proper action the purchaser has the legal title to the land and the person entitled to question the sale cannot maintain ejectment. *McCrubb v. Bray*, 36 Wis. 333, distinguished.

APPEAL from a judgment of the circuit court for Waukesha county: WARHAM PARKS, Circuit Judge. *Affirmed.*

This is an action of ejectment to recover 103.76 acres of land situated in sections 4 and 5 of the town of Delafield and sections 32 and 33 of the town of Merton, in Waukesha county, Wisconsin. The defendants claim title under an administrators' sale, and the plaintiff contends that the evidence shows that the administrator was directly or indirectly interested in such sale, and hence that it was void.

Trial by jury was waived, and the action was tried by

the court. The evidence showed that on the 11th of December, 1870, one Pearson Gibson, of Waukesha county, died intestate, owning the lands in suit, with others in the vicinity, and leaving surviving him his widow, Mary Ann Gibson, and the plaintiff, his son, who was then less than two years old and was the only heir at law. On the 21st of December, 1871, the defendant *Mark Gibson*, a brother of the deceased, and Mary A. Gibson, the widow, and one Joseph Johnson, were duly appointed administrators of the estate of Pearson Gibson, deceased, and thereafter duly qualified. There were two mortgages which covered the land in question and the other lands of Pearson Gibson at the time of his decease,— one for $1,500 and interest, dated November 27, 1868, to one Matthew Middlewood, and one for $1,000 and interest, dated February 14, 1870, to Joel Hastings. A considerable amount of claims was proven against the estate, and allowed, in the county court, but the exact amount of the claims so allowed does not appear in the record. In order to pay said claims and the above mortgages, it became necessary to sell some of the real estate of the deceased; and on the 18th of March, 1872, upon proceedings duly had, the administrators were licensed to sell the real estate involved in this action, for the purpose of paying said mortgages and debts. After due notice, the land in question was sold April 15, 1872, by the administrators, for $41 per acre, amounting to $4,254.98 in all, to George Gibson, a son of the defendant *Mark Gibson*. There was some conflict in the testimony as to the value of the lands at the time of the sale, but the court found, upon sufficient testimony, that $41 per acre was its full value. This sale was confirmed by the county court April 23, 1872, and the administrators were directed to deed the land to the purchaser. An administrators' deed was made out, bearing date April 30, 1872, but was not acknowledged by the administrators until September 2, 1872, and was recorded Sep-

tember 19, 1872. October 28, 1872, George H. Gibson, the purchaser, deeded to *Mark Gibson*, the defendant, the east 45.12 acres of the land in question, for the expressed consideration of $2,035. George Gibson, the purchaser, died in 1893, intestate and unmarried, leaving the defendants, his father and mother, as his only heirs at law; and his estate was afterwards duly probated, and the lands owned by him assigned to the defendants.

The records of the county court in the matter of the estate of Pearson Gibson show that the proceeds of the administrators' sale were, in form, accounted for by the administrators and applied to the payment of the debts of the estate, and that upon settlement of the estate a balance of $279.48 was assigned to Louis Gibson, the heir at law, and paid over to his guardian. The records in the office of the register of deeds further show that on the 4th of June, 1872, *Mark Gibson* and wife executed a mortgage to Joel Hastings for $1,000 on that part of the northwest quarter of section 4, town of Delafield, lying south of the Milwaukee & St. Paul Railroad, containing seventy-four acres, and that on the same day Joel Hastings discharged the Pearson Gibson mortgage to him, covering the land in suit. It further appears from said records that on the 2d of September, 1872, George H. Gibson gave a mortgage to Matthew Middlewood for $1,900, covering the land in suit, except the east fifty acres thereof, and that it secured the payment of seven promissory notes for $1,904, executed by *Mark Gibson* and George H. Gibson, and that upon the same day the mortgage from Pearson Gibson to Matthew Middlewood for $1,580 was released by Middlewood. It further appears from the records that on the 9th of December, 1872, the mortgage given by *Mark Gibson* to Hastings June 4, 1872, was released by Hastings, and that upon the same day *Mark Gibson* deeded other lands owned by him to one Vettelson for $2,500.

Practically all of the facts hereinabove stated appear from the records either of the county court or of the office of the register of deeds, and so are not capable of much dispute.

The defendant *Mark Gibson* was put upon the stand as a witness in his own behalf, and testified, as to the transactions under investigation, substantially as follows: That the property in question at the time of the administrator's sale was sold to George H. Gibson and one Peter Christianson in partnership, but that the bid was made by George alone; that the land was put up for sale upon one day, and the sale adjourned until the next day, and that there were other bidders there, but that George's bid was the highest; that he was not interested in his son's purchase; that his son was twenty-eight years old at the time, and had a team of horses and a threshing machine, and that he had made $1,400 threshing with his machine in one season; that George and Christianson worked the property during the season of 1872, George working the west half and Christianson the east half thereof, and that in the fall of 1872 Christianson found that he could not raise the money to complete the purchase, and so he (the witness) took it; that the land was paid for in cash and mortgages; that he received $4,200 from George Gibson in mortgages and other shape; that he (witness) took up the Hastings mortgage by giving a mortgage of his own on the same land; that George paid for that land by turning some money, and some he borrowed, and that Middlewood mortgage; that he never turned any mortgage over to him (witness), but that he paid money enough to pay for the whole land, with the mortgage; that George paid up the debts and the mortgage, and everything, and then he got it on his part; that he paid him (witness) money on the property,— paid up and settled to our satisfaction, and got his deed; that the Hastings mortgage was on the whole property, and that he could not think how that was settled; that

when Christianson failed to take his part of the land and pay for it, and George could not sell it to any one else, he (George) sold it to him; that no one else would give as much for it, and the administrators did not sell it to him (witness); that he simply took the place of Christianson; that at the time of the sale he (witness) was indebted to his son for labor and money loaned, and in October he purchased part of the land from his son, because Christianson gave up the purchase and George could not pay for it all.

Mary Gibson, a daughter of the defendant, was also sworn as a witness, and testified that her brother George and Christianson worked the land during the summer of 1872, and that she heard a conversation between them to the effect that Christianson could not take his share of the land, and that her brother George had run a threshing machine a good many years, and had worked for his father and for other people, and her father owed him for labor, and that he had loaned money to her father during several years, and her father was owing him at the time of the sale. There was other proof on the part of the defendants showing that there were a number of other bidders present at the time of the sale, and that the sale was held open two days, and that George's bid was the best bid received. There was also evidence of one John Christianson substantiating the fact that Peter Christianson was to have a share of the place, under George's bid, and that he attempted to raise the money to take his share of the land.

The circuit court found generally that the lands were sold for full consideration, and the purchase price was duly applied to the payment of the mortgages and debts of the estate; that all the proceedings were regular and the sale fairly made; and that neither of the defendants was directly or indirectly interested in the purchase of the lands. And upon these findings the plaintiff's complaint was dismissed, and the plaintiff appeals.

For the appellant there was a brief by *D. H. Sumner* and *Ryan & Merton*, and oral argument by *T. E. Ryan.*

For the respondents there was a brief by *Carney, Clasen & Walsh*, and oral argument by *E. D. Walsh.*

WINSLOW, J. In harmony with well-known common-law principles, our statute (Stats. 1898, sec. 3914) has long provided that an executor, administrator, or guardian shall not be *directly or indirectly* interested in the purchase of any real estate sold by him in his official capacity, and that, if he be so interested, the sale shall be void. The word "void" in this section has been construed to mean "voidable," by this court. *Melms v. Pabst B. Co.* 93 Wis. 153. The integrity of this statute has always been jealously maintained by this court. *McCrubb v. Bray*, 36 Wis. 333; *Martin v. Morris*, 62 Wis. 418; *In re Taylor Orphan Asylum*, 36 Wis. 534.

The question which was litigated in the present case was whether the defendant *Mark Gibson* was directly or indirectly interested in the sale of the land to his son. Many of the facts are without dispute. The premises were bid off by George, April 15, 1872, at what seems a fair price, and the sale was confirmed April 23d. An administrators' deed seems to have been made out, dated April 30th, but evidently it was not then executed or delivered. George went into possession of part of the land, and one Christianson into possession of the remainder. The evidence is of the vaguest character as to any payments on the land. The defendant says that he got money from George every little while, but cannot tell how much; nor is it shown that George had anything to pay with. Thus matters stood until June 4th, when *Mark Gibson* gave a mortgage on his own lands to Hastings for $1,000, and Hastings discharged the Pearson Gibson mortgage on the lands in suit. The defendant does not explain this transaction satisfactorily. He does not state unequivocally that he owed George the money, but this is

evidently the theory of the defense. Coming down to September 2d, we find the sale still uncompleted, and the Middlewood mortgage, now amounting to $1,900, still unpaid; and upon this day we find that George and *Mark Gibson* give their notes to Middlewood for $1,900, secured by a mortgage on the land in question, *except the east fifty acres* thereof; and on the same day Middlewood discharges the previous mortgage, and the administrator's deed is finally acknowledged, but not placed on record until September 19, 1872. Thus, it stands established that the sale was not finally completed until as late as September 2d, and then it was completed by the giving of the notes of George and *Mark* for almost half of the purchase price, secured by mortgage on the west half of the land. On the 28th day of the following month, George deeds the east forty-five acres of the land to the defendant. This situation of affairs seems to us to call for the most clear and convincing explanation. Having advanced one fourth of the purchase price in securities and become security for nearly one half by his signature to notes, he appears, within two months after the execution of the deed, as the owner of one half of the land. These suspicious and suggestive circumstances are not satisfactorily explained. We have carefully examined the evidence of the defendant, and find it vague and contradictory, and in some instances absolutely contradictory of the records. For instance, he denied giving a mortgage to Hastings until after the deed was given to George Gibson, and could not think how the Hastings mortgage was paid, and denied giving any mortgage at all to Hastings to take up the Pearson Gibson mortgage. His testimony as to how George Gibson paid for the property is unsatisfactory to the last degree. At one time he says that it was paid in money, then in mortgages and other shapes, but he cannot specify a single payment that George made at any time. Carefully as we have considered the testimony, we think it entirely fails to show that this

administrator came into possession of nearly one half of his intestate's estate rightfully. The inferences of direct or indirect interest on his part in the transaction which begin with the giving of the Hastings mortgage, June 4, 1872, and end with the deed of half the land to him October 28th in the same year, are too strong and convincing to be overcome by the vague and contradictory general statements which we find in the testimony. Thus, we find ourselves unable to agree with the findings of the circuit judge to the effect that the defendant *Mark* was not directly or indirectly interested in the sale of the land, although we do not think that actual or intentional fraud on his part was proven.

But a difficulty here arises which bars the plaintiff's recovery in ejectment. The principle is familiar that in ejectment the plaintiff must recover on the strength of his own title. As has been previously pointed out in this opinion, it has been held by this court that an administrator's sale of land, in which the administrator is himself interested, is not absolutely void, but voidable only at the election of the persons entitled to avoid it. *Melms v. Pabst B. Co.* 93 Wis. 153. It follows from this that the defendants have legal title to the lands in suit until such title is set aside in some proper action. Until such setting aside of the sale, the plaintiff cannot maintain the purely legal action of ejectment, because, on his own showing, the defendants still have the title. *Yeackel v. Litchfield*, 13 Allen, 417. In harmony with this doctrine, it has been held in this court that where the defendant has the apparent legal title of record, and the facts which make that title inequitable or fraudulent as to the plaintiff are not of record, an equitable action is the proper action in which to obtain an adjudication of the plaintiff's rights. *Prickett v. Muck*, 74 Wis. 199; *Spiess v. Neuberg*, 71 Wis. 279; *Burrows v. Rutledge*, 76 Wis. 22. In such equitable action, if it should appear that there was constructive fraud, only, on the part of the defendants, a court

of equity can and will fix terms upon which the conveyance will be set aside. *Cook v. Berlin W. M. Co.* 56 Wis. 643, and cases there cited; *Yeackel v. Litchfield, supra.* Compare *Hawley v. Tesch*, 88 Wis. 213. We do not see how this can be done in an action at law, even under the betterments statute. We are aware that in *McCrubb v. Bray*, 36 Wis. 333, a recovery in ejectment was sustained in an action brought by the heir against an administrator who had purchased at his own sale; but the point was nowhere raised in the case, and the statute had not then been construed to mean that such a sale was voidable only, so we do not consider the question as settled in that case.

It follows that, although we disagree with the circuit judge as to the question of interest on the part of the administrator in the sale, still the judgment must be affirmed, because the evidence shows that the title to the lands in question is still in the defendants, and must be avoided, if at all, in an action in equity.

By the Court.—Judgment affirmed, without prejudice to the right of the plaintiff to bring an equitable action to avoid the defendants' title as indicated in the opinion.

BARDEEN, J., took no part.

THE STATE EX REL. HARTUNG, Appellant, vs. CITY OF MILWAUKEE, Respondent.

102 509
109 568

102 509
58 LRA 900

February 25.—April 4, 1899.

Public nuisance: Injunction: Who may bring action: Appeal: Undertaking.

1. An action in the circuit court to enjoin the continuance of a public nuisance must be instituted by the proper law officer of the state, and that court has no power to authorize a private relator to act *pro hac vice* as such officer. *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, distinguished.

2. Such an action, when instituted by a private relator in the name of the state, is not an action brought by the state, and an effective appeal therein cannot be taken by the relator without the giving of an undertaking.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Appeal dismissed.*

The relator is chairman of the board of supervisors of the town of Wauwatosa, and a member of the board of health of said town. Before bringing this action, he applied to the attorney general, requesting him to bring suit in the name of the state, in the circuit court for Milwaukee county, to enjoin the city of *Milwaukee* from depositing its garbage on lands in the town of Wauwatosa. The attorney general denied the request, whereupon the relator, upon notice to the attorney general, applied to the circuit court for Milwaukee county for leave to prosecute this information in equity in the name of the attorney general and on behalf of the state, which leave was granted. Thereupon the summons and complaint in this action were served upon the city.

In the complaint the relator claims to sue on behalf of the state and in the name of the attorney general, and informed the court that the city of *Milwaukee* was depositing 100 loads of garbage per day upon certain premises in the town of Wauwatosa, immediately adjoining highways, and leaving the same there to the depth of eight or twelve inches, and that there was emitted therefrom stenches and smells deleterious to the public health, and that the same was in contravention of a valid ordinance of the town of Wauwatosa; and a perpetual injunction was demanded. The city appeared in the action, and admitted that it was depositing garbage upon the premises named, and alleged that the same was deposited in trenches, and was immediately covered over with dirt, and constituted no nuisance nor menace to the public health.

The case was tried by the court, and a large amount of testimony of citizens and experts was taken. The court found that the garbage was immediately covered with dirt, and created no nuisance, and was not deleterious to the public health, and denied the application for an injunction, and rendered judgment against the relator with costs. The relator gave notice of appeal from this judgment, but gave no bond upon such appeal.

N. S. Murphey, for the appellant, contended, *inter alia*, that it is settled law, both in this country and in England, that the attorney general, or a private relator, may maintain an action in the name of the state to enjoin the erection or continuance of public nuisances. *State v. Carpenter*, 68 Wis. 172; 2 High, Inj. §§ 1303, 1304, 1554; *Bell v. Platteville*, 71 Wis. 147; *Attorney General v. Railroad Cos.* 35 Wis. 526; *People v. Vanderbilt*, 26 N. Y. 287; *S. C.* 28 N. Y. 396; *S. C.* 38 Barb. 282; *State ex rel. Little v. D. & S. E. R. Co.* 36 Ohio St. 434; *People v. Miner*, 2 Lans. 396; *Attorney General v. Richards*, 2 Anst. 603; *People ex rel. Teschemacher v. Davidson*, 30 Cal. 379; *Attorney General v. Steward*, 21 N. J. Eq. 340; *Attorney General v. Cohoes Co.* 6 Paige, 133; *Corning v. Lowerre*, 6 Johns. Ch. 439; 2 Story, Eq. Jur. §§ 921, 922; *Davis v. New York*, 2 Duer, 663; *S. C.* 14 N. Y. 526; *State v. Saline Co. Court*, 51 Mo. 350; *State ex rel. Cramer v. Hager*, 91 Mo. 452; *Rowe v. Granite B. Corp.* 21 Pick. 344.

For the respondent there was a brief by *Carl Runge*, city attorney, and *C. H. Hamilton*, of counsel, and oral argument by *Mr. Hamilton*.

WINSLOW, J. This is avowedly an action in equity to perpetually enjoin the continuance of an alleged public nuisance. The relator, *Hartung*, does not claim that he has suffered any "private or special injury peculiar to himself," but explicitly states that the nuisance is a public one, and that he claims the right to maintain this action on behalf of the state,

in the name of the attorney general; and the first question in the case is whether such an action can be maintained.

The remedies in equity by way of injunction in case of a public nuisance were well understood at common law, and were twofold, viz.: (1) In case the threatened public nuisance threatened also to invade private rights and inflict a special and peculiar injury to any person, such person might maintain an action in equity to enjoin its establishment or continuance; (2) in case the nuisance was purely public, the remedy was by bill or information in equity on behalf of the people, instituted by the attorney general or other proper law officer of the state. Thus, so far as the threatened nuisance was private in its aspect it was prevented in a purely private action; and so far as it was public it was prevented in a purely public action. Wood, Nuisances (3d ed.), §§ 777, 819. This was entirely logical, and the doctrine has been expressly or impliedly approved by many of the American courts which have had occasion to treat the subject. *Attorney General v. Railroad Cos.* 35 Wis. 425 (see pages 533 *et seq.*); *People v. Vanderbilt*, 26 N. Y. 287; *People v. Equity G. L. Co.* 141 N. Y. 232; *Georgetown v. Alexandria C. Co.* 12 Pet. 91; *District Attorney v. L. & B. R. Co.* 16 Gray, 242; 2 Story, Eq. Jur. §§ 922, 923; *Baines v. Baker*, 1 Ambl. 158; Angell, Watercourses (7th ed.), § 565; 2 High, Inj. (3d ed.), § 1554; Ang. & D. Highways (3d ed.), § 280; *State v. Carpenter*, 68 Wis. 165; *Hunt v. Chicago H. & D. R. Co.* 121 Ill. 638; 3 Am. & Eng. Ency. of Law (2d ed.), 481, and cases cited in notes. We have been referred to no case, however, which holds that this action on behalf of the public may be maintained by a private relator without the presence of the proper law officer of the state. It is true that the expression is frequently used that the information may be filed either by the attorney general *ex officio, or* upon the relation of a private person. *District Attorney v. L. & B. R. Co., supra; State ex rel. Little v. D. & S. E. R. Co.* 36 Ohio St. 434. But

this does not mean that a private relator may prosecute alone, and without the presence of the proper law officer of the state. It simply means that a private person, especially interested perhaps, may make the sworn relation upon which the attorney general or other proper prosecuting officer of the state founds his action.

It seems quite probable that the trial court, in making the order allowing the action to proceed in the name of the state upon the relation of a citizen, relied upon what was said in the case of *State ex rel. Lamb v. Cunningham* (known as the "Gerrymander Case"), 83 Wis. 90. Careful consideration of that case, however, demonstrates its inapplicability to the present case. That case was an action brought in this court, and clearly within its original jurisdiction, because it affected "the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." In the *Railroad Cases*, 35 Wis. 425, it was, in substance, held that the writ of injunction, as given to this court by the constitution, being classed with *mandamus*, *habeas corpus*, *quo warranto*, and *certiorari*, was a *quasi* prerogative writ, and that all of such writs were given to the supreme court for prerogative uses only. Being thus classed with *mandamus* as a prerogative writ as given to this court, and the law being quite well settled that *mandamus* to enforce the performance of public duties may be sued out by any citizen if the attorney general refuses to appear (Merrill, Mandamus, §§ 229, 230), it was held in the second *Gerrymander Case* (83 Wis. 90), that this court would entertain an information for injunction to restrain a public officer from enforcing a law which interfered with the liberties of the people, at the suit of a private relator acting in the name of the state, upon permission obtained from the court. But it by no means follows that the same rule applies to injunctions sued out of the circuit court. It has been already held in this very matter that such a case as this is not one within the original

jurisdiction of this court, because it does not affect either "the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *In re Hartung*, 98 Wis. 140. Hence it is a case within the jurisdiction of the circuit court or court of general jurisdiction. The circuit court is given by the constitution the same writs which are given to the supreme court; but, as pointed out in the *Railroad Cases*, they are given to the circuit courts as an appurtenance to their general jurisdiction, and the writ of injunction, as given to the circuit court, is not a prerogative or jurisdictional writ, but is the order of a court of equity, made in the progress of a suit, and is taken by the circuit court simply with the powers and uses of the English court of chancery. Therefore it seems clear that the rule adopted in this court with reference to the *quasi* prerogative writ of injunction as given to this court has no necessary application to the purely equitable writ of injunction possessed by the circuit courts, to be used according to the powers and uses of the court of chancery. Nor do we deem it in any view desirable to extend the rule to such cases. Hence it follows that this action was never in fact an action on behalf of the state, because the state has never been represented by its proper law officer, and the court has no power to authorize a private relator to act *pro hac vice* as such officer.

It has not been necessary to discuss or decide in this opinion whether the attorney general or the district attorney is the proper officer to file such an information as is now before us, in the circuit court. The constitution provides that the powers and duties of the attorney general shall be prescribed by law. Const. art. VI, sec. 3. His general duties are laid down in sec. 163, Stats. 1898. It is made his duty to appear and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and all such civil cases as may be sent or remanded by that court to any circuit court, and to appear for the state in any court in any cause

or matter, civil or criminal, in which the state or the people may be interested, whenever requested by the governor or either branch of the legislature. He is also required to perform all other duties imposed on him by law. Sec. 3236, Stats. 1898, gives the attorney general power to commence an action in the name of the state in any circuit court against a corporation, and obtain an injunction restraining the corporation from assuming or exercising any franchise, liberty, or privilege, or transacting any business, not authorized by its charter. By sec. 752, Stats. 1898, the district attorney is required to prosecute or defend all actions, applications, or motions, civil or criminal, in the circuit court of his county, in which the state or county is interested or a party. Whether in the present case the attorney general or the district attorney was the proper public officer to file and prosecute the information is an interesting question, but it was not argued, and, as it is not necessary to the decision of the case, we refrain from expressing an opinion upon it.

The view taken of the case makes it necessary to dismiss the appeal. As it was not an action brought by the state, but by a private party, an effective appeal could not be taken without the giving of an undertaking. None was given in this case. Stats. 1898, secs. 3049–3052.

By the Court.— Appeal dismissed.

SCHUG, by guardian *ad litem*, Appellant, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

102 515
104 666
102 515
108 131
108 264
108 346
108 347
102 515
110 [1]159

February 27 — April 4, 1899.

Railroads: Injury to boy trespassing on track: Contributory negligence: Gross negligence: Court and jury: License to use track as foot-way.

1. Plaintiff, a bright, intelligent boy ten years of age, had, with two other boys, been running westward along a railroad track at a place where it was unlawful for them to be. Just before reaching

a street he attempted to cross the track and was struck by a locomotive coming from the east at an unlawful speed, the bell on which had not been rung, though its whistle was sounded immediately prior to the accident. The boy knew that it was dangerous to walk along or get upon the track, and had been cautioned by his parents not to go around trains. He testified that although he knew the train came along about that time he had not thought of it until just before he was struck. It appeared that from the street a man could be seen on the track nearly 1,100 feet to the east; but there was no evidence that either of the boys was actually on the track after the train approached where they could be seen from the engine, or that the engineer or fireman saw any of them, or that their clothing was such as naturally to attract attention. In an action for the injuries sustained. *held*, that a nonsuit was properly granted. DODGE and WINSLOW, JJ., dissent, being of the opinion that the question whether defendant's servants were guilty of gross negligence should have been submitted to the jury.

2. The fact that a railroad track, at a place where it was protected by fences and cattle-guards and where it was unlawful, under sec. 1811, R. S. 1878, for persons to walk, was frequently used by pedestrians does not show that such use was licensed by the company, in the absence of evidence that it acquiesced in or invited the trespass.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Eaton & Weed* and *Henry Fitzgibbon*, and oral argument by *H. I. Weed* and *M. H. Eaton.* They contended, *inter alia*, that the plaintiff by reason of his age could not, as a matter of law, be held guilty of contributory negligence. *Ewen v. C. & N. W. R. Co.* 38 Wis. 613; *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626; *Hemmingway v. C., M. & St. P. R. Co.* 72 Wis. 42; *Whalen v. C. & N. W. R. Co.* 75 Wis. 654; *Swift v. S. I. R. T. R. Co.* 123 N. Y. 645; *Bottoms v. S. & R. R. Co.* 25 L. R. A. 784, and cases in notes; *Johnson v. C. & N. W. R. Co.* 56 Wis. 274, 279; *S. C.* 49 Wis. 529, 531; *Heddles v. C. & N. W. R. Co.* 74 Wis. 239; *Mc Voy v. Oakes*, 91 Wis. 214; *Carmer v. C., St. P., M. & O. R. Co.* 95 Wis. 513; *Mowrey v.*

Central City Ry. 51 N. Y. 666; *Byrne v. N. Y. C. & H. R. R. Co.* 83 N. Y. 620; *Dowling v. N. Y. C. & H. R. R. Co.* 90 N. Y. 670; *Hepfel v. St. P., M. & M. R. Co.* 49 Minn. 263; *Henderson v. St. P. & D. R. Co.* 52 Minn. 479. Even though the plaintiff had been upon the right of way instead of the street, the defendant's servants were bound to exercise reasonable care for his safety, and in neglecting to do so were guilty of gross and culpable negligence. *Valin v. M. & N. R. Co.* 82 Wis. 1; *Woodward v. West Side St. R. Co.* 71 Wis. 625; *Whalen v. C. & N. W. R. Co.* 75 Wis. 654. It is gross negligence to run trains at a rate of speed prohibited by law. It is a question for a jury whether children were guilty of contributory negligence in running in front of a train. *Chicago & A. R. Co. v. Becker*, 84 Ill. 483; *Allen v. A. C. R. Co.* 106 Iowa, 602.

For the respondent there was a brief by *Barbers & Beglinger*, attorneys, and *H. H. Field*, of counsel, and oral argument by *Burton Hanson.*

CASSODAY, C. J. This is an action for personal injuries sustained by the plaintiff, a boy of ten years of age, having his foot cut off by being struck by a passenger train of the defendant while he was on the track, May 29, 1897, between 10 and 11 o'clock in the forenoon. Issue being joined and trial had, the court, at the close of the testimony, granted a nonsuit, and from the judgment entered thereon the plaintiff brings this appeal.

The facts revealed upon the trial are to the effect that the defendant's railway ran from Menasha in an easterly direction to Hilbert Junction; that it crossed Konemac street, which ran north and south at right angles with the railway track; that that was the first street in Menasha crossed by the railway track coming from the east; that some 200 feet east of that crossing the track gradually began to curve towards the north, and continued to so curve for a distance

of 400 or 500 feet, after which it ran eastward in a straight line at an angle of fifteen or twenty degrees from the line of the track at the street crossing projected; that the defendant's right of way was 100 feet wide, and fenced on both sides; that there were cattle-guards on each side of the street, connected by wing fences on each side of the right of way; that there were no sidewalks on either side of that street; that there was a plank crossing near the middle of the street; that the defendant's depot was several blocks west of that street; that the one-mile station was nearly 1,900 feet easterly from the crossing; that within that distance were two whistling posts,—one about 1,150 feet easterly of the street, and the other a little over 200 feet easterly of the street; that the plaintiff lived with his parents four or five blocks south and west of the crossing, and had lived in Menasha from early childhood; that on the morning in question he left his home to go to the beach, about a mile east of the crossing, to get a pail of sand for his mother's birds; that two other boys — Rudolph Mayer, about the same age, and John Dryjewski, who was about a year older — went with him; that when they got to Konemac street they went down that street to the railway track, and then crossed over the cattle guards, and followed the railway track easterly for about a mile; that they fished, and he got his pail of sand; that they then started back home along the track; that when they got between the two whistling posts, and about by the curve mentioned, they thought of the ball game, and began to run; that the plaintiff ran ahead upon the ties on the north side of the track; that Rudolph ran upon the south side of the track; that John ran in the middle; that they ran nearly to Konemac street; that as they neared the street, and just as the plaintiff started to cross the cattle-guard, he looked around and saw Rudolph behind him on the north side of the track, and John still further back, but was off the ties, and running on the side of the track; that

he saw no train, and heard no whistle or bell; that in crossing the cattle-guard he stepped from one of the peaks to the other; that as soon as he got across the cattle-guard he started from the north side of the track to go to the south side of the track; that he so started to cross the track near the old cattle-guard; that just as he got in the middle of the main track, between the rails, Rudolph said the train was coming, and that, as the plaintiff was going to jump over the iron, his foot got caught under the rail, three or four feet from the cattle-guard, and he was struck by the train coming from the east; that he had two fish poles in his hand, one twenty feet long and the other shorter; that if he had not stumbled and fallen he would have gotten off the track before he was struck; that that was the time he lost his foot; that up to that time he had not thought about the train; that he knew the train came along about that time; that it was a nice, quiet day in the latter part of May, and that there was no noise by the wind or anything; that his father and mother had for years cautioned him not to go around trains, because he would be hurt; that he knew there was danger of being run over in getting on the railway track; that his parents did not know that he was going upon the railway track at the time in question; that he knew it was dangerous to walk on the track or the ends of the ties; that he knew the track was fenced in to keep people and animals out; that he had been to school ever since he was five years old; that he was in the sixth grade, and was studying German and arithmetic — fractions; that he had known for a good many years that if he was on the track, and a train came along, he was liable to get hurt, and, if he had seen or heard the train, he should have gotten off the track; that Rudolph testified to the effect that he heard three short whistles, and jumped off the track, and said, "Look out, *Willie!*" and the train struck him; that John testified to the effect that he heard some noise, and turned around, and saw

the train coming, and jumped off the track, and was going to holler, when he saw the plaintiff, who was in the act of crossing from the north to the south side of the track, thrown in the air; that the train started from Hilbert Junction on that day at 10:15 a. m., and was due at Menasha at 10:47 a. m., and was on time; that when the leaves were on the trees in the latter part of May a man could be seen from the center of Konemac street crossing on the track east at a distance of 1,092 feet, or about sixty-six rods; that the train at the time of the injury was running at the rate of thirty-five to forty miles per hour; that it did not stop until it was 1,323 feet past Konemac street; that three sharp whistles were sounded immediately prior to the accident; that the bell was not rung; that two witnesses on the part of the plaintiff testified that just prior to the three sharp whistles there was one long whistle; that a train equipped as that was, and running fifteen miles an hour, could be stopped in a distance of 100 feet, and running forty-five miles an hour could be stopped in a distance of 1,000 feet. Such is an outline of the evidence on which the nonsuit was granted.

No evidence was offered on behalf of the defendant. The accident occurred within the limits of Menasha, and hence the train was, at the time, running at an unlawful rate of speed. Stats. 1898, sec. 1809*a*. The statute also required the bell to be rung before and while crossing that street. Sec. 1809, R. S. 1878. But these statutes do not make the railway company absolutely liable for injuries to persons caused by trains running at an excessive rate of speed. *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378. On the contrary, such liability may be defeated by contributory negligence on the part of the person injured. *Id.* The portion of the track east of the street appears to have been protected by fences and cattle-guards, as required by the statute. R. S. 1878, sec. 1810. The statute made it unlawful "for any person, other than those connected with or

employed upon the railroad, to walk along the track" east of that street. Sec. 1811, R. S. 1878. The plaintiff and his two companions were walking along the track in violation of that statute. True, there is testimony tending to prove that during the fall and summer before the accident people went up and came down and out upon that track almost every day; but there is nothing in the testimony indicating that the defendant acquiesced in, much less invited, such trespass. It is unlike the habitual use by pedestrians of particular paths, walks, and drives at railway stations and on depot grounds and yards which are unfenced and open to the public, and where they may be readily observed by agents of the company. *Anderson v. C., St. P., M. & O. R. Co.* 87 Wis. 195, 205. In that case the plaintiff's intestate was killed while walking upon a bridge, constituting a part of the main track, at a considerable distance from the depot grounds, and it was held that the statute was applicable; that no license to use the trestle as a footway could be implied from its customary use by pedestrians for that purpose, especially as it was so built as to repel, rather than invite, foot travelers over it. Here the fences and cattle-guards were perpetual warnings against the use of such track by pedestrians. The same distinction has been maintained in later cases. *Mason v. C., St. P., M. & O. R. Co.* 89 Wis. 156, 157; *Carmer v. C., St. P., M. & O. R. Co.* 95 Wis. 517.

The same distinction has been maintained in other jurisdictions. Thus, in a recent case in Oregon it was held that: "The mere fact that persons have frequently trespassed upon a railroad track, and that the company has resorted to no means to stop such trespassers, does not amount to a permission or license to use the track as a foot-path. A railroad company owes to a trespasser upon its track no legal duty to keep a lookout or guard him against danger. The finding of the body of a child on a railroad track, where it had been struck by a train, raises no presumption of negligence

on the part of the company, although the track was straight and clear, where there is nothing to show the circumstances of the accident, or how long the child had been on the track when struck." *Ward v. S. P. Co.* 23 L. R. A. 715. Numerous cases are there cited from different states in support of such ruling. To the same effect is a recent case in Georgia, where the boy killed was eleven years of age. *Atlanta & C. A. L. R. Co. v. Gravitt*, 26 L. R. A. 553. So it has recently been held by the circuit court of appeals for this circuit, in an opinion written by Judge SEAMAN, sitting with Judges WOODS and SHOWALTER, that: "A railroad company is not bound to any act or service in anticipation of trespassers on its track, nor is the engineer obliged to look out for them; and a trespasser venturing upon the track for purposes of his own assumes all risk of conditions which may be found there, including the operation of engines and cars." *Sheehan v. St. P. & D. R. Co.* 76 Fed. Rep. 201.

It is apparent from the testimony in this case that the plaintiff was a very bright, intelligent boy, who admits that he knew when he went upon the track that he was not only disobeying the repeated injunctions of his parents, but that it was dangerous and wrong for him to be there. The allegation that he was lawfully traveling over and along the street when injured is expressly negatived by his own testimony. The cattle-guards were outside of the street, and confessedly he had not gotten into the street; much less was he a traveler upon the street. The complaint alleges that the plaintiff was injured "through the gross carelessness, negligence, and want of ordinary care and prudence of the defendant, its officers, agents, and employees, in carelessly and negligently and recklessly running and propelling the engine of the defendant attached to said passenger coaches, as aforesaid, through and over the street" in question, without giving any warning. The only evidence of gross carelessness and negligence, or of recklessly running and propelling

the engine over the street without warning, is the excessive rate of speed and the failure to ring the bell. There is no evidence that either of the boys was actually on the track after the train approached where they might have been seen by the engineer or fireman. True, they were running by the side of the track, but there is no evidence that the engineer or fireman saw any of them, nor that their clothing was such as naturally to attract attention. Gross negligence or carelessness is such a degree of rashness or wantonness as evinces a total disregard for the safety of persons or property, and is but little less than intentional wrong. *Lockwood v. Belle City St. R. Co.* 92 Wis. 108–112, and cases there cited; *Schilling v. C., M. & St. P. R. Co.* 71 Wis. 255. It is such a degree of recklessness or wantonness as would constitute some of the lower degrees of manslaughter in case death should result. Stats. 1898, secs. 4355–4363. Upon the evidence in the record no court, it is believed, would be justified in submitting to the jury the question whether the engineer or fireman was guilty of manslaughter, merely because they failed to see these boys by the side of the track, where they had no legal right to be, and hence where they were not expected to be. We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

DODGE, J. I find myself unable to concur in the decision of the court in this case, or in a rule of law which exempts railroad companies so entirely from any duty to guard against injury to children in the operation of their dangerous apparatus. When three little boys are seen running along a railroad track a thousand feet ahead of an engine, it seems to me gross negligence for the engineer to drive his train at an excessive and unlawful rate of speed upon them, without signal and without check. It evinces to my mind that recklessness and wantonness which constitutes that degree of

negligence, whether or not there be intent or wilful purpose to injure. If it be urged that from the fact that the boys were running the engineer might infer that they knew of the approach of the train, it must have been obvious to him, from the slightest knowledge of boyish instincts and tendencies, that they were running to reach the street before the train overtook them, and he should have realized that they might not be able to accomplish that purpose. A very slight checking of the unlawful speed of this train would have saved them from the needless peril. If, however, he did not draw the inference that they knew of the approach of the train, then nothing could be more heedless and wanton than to allow them, without signal, to remain in ignorance while this peril was rushing upon them. I have assumed that the children were seen by the engineer, for they were in plain sight from the curve in the track, 1,092 feet away; and the known custom of close observation of the track ahead, supplemented by the absence of any denial from engineer or fireman, who could refute the fact if not true, would certainly support a verdict to that effect.

As no statements of mine can serve as a guide to the profession, I shall not incumber the reports with any extended discussion or citation of authorities. In *Stucke v. M. & M. R. Co.* 9 Wis. 212, the company was declared to be rendered liable by "wanton or needless damage," or "where the facts show such a degree of rashness or wantonness on the part of the servants of the company as evinces a total want of care for the safety of the cattle;" and it was held necessary to submit to the jury the question of gross negligence where the engineer drove his train upon cattle in plain sight, without either checking speed or sounding the whistle. That authority, I think, has never been questioned, and, such being the rule of this court as to the duty due to cattle trespassing upon the track, I am unwilling to relax it in case of children. I think the question whether defendant's servants

were guilty of gross negligence causing plaintiff's injury should have been submitted to the jury.

WINSLOW, J. I concur in the foregoing opinion of Mr. Justice DODGE.

CALTEAUX, Assignee, Respondent, vs. MUELLER, Appellant.

March 14—April 4, 1899.

(1, 3) *Corporations: Power to purchase their own stock: Authority of officers: Contracts.* (2, 4) *Practice: Plea of another action pending: Judgment without verdict.*

1. A corporation, not prohibited by its charter, may purchase its own capital stock, yet such power cannot be exercised by an officer of the corporation without special authorization in that regard by its board of directors.
2. A plea of the pendency of an action previously commenced to enforce the same cause of action, is not good unless it shows that the parties thereto are identical with those in the second action, or that such as are not identical are in privity with the former parties.
3. If a secretary and business manager of a corporation, having no authority other than that ordinarily incident to such a position, sell and deliver to another property of the corporation, agreeing to accept in its behalf some of its capital stock in payment therefor, and such other disable himself from returning such property by transferring title thereof to a third person, the corporation may, at its election, hold such other liable on an implied promise to pay for such property at the sale price.
4. Where one party to an action is, on the evidence, entitled to judgment as a matter of law, the taking of a verdict in his favor is an immaterial formality; hence if, in such circumstances, the case be submitted to a jury who fail to agree, the court may then discharge them and order judgment in accordance with the facts.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Sheboygan county: N. S. GILSON, Circuit Judge. *Affirmed.*

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The complaint was for the recovery of $498 with legal interest from October 19, 1895, alleged to be due from defendant *Anton V. Mueller* for three altars, a communion rail, and crucifix, said to have been sold him by plaintiff's assignor, a manufacturing corporation called the St. Francis Art Institute. The St. Mary's Congregation of Random Lake was joined as defendant, but no cause of action was stated, or evidence produced to establish any cause of action as to it. Defendant *Mueller* answered, admitting purchase of the articles mentioned in the complaint, but alleging that it was made through H. T. Stemper as secretary and business manager of the St. Francis Art Institute, that it was agreed defendant should give therefor five shares of the capital stock of the institute company, and that the articles were delivered pursuant to such agreement and the stock duly tendered to plaintiff. There were further allegations showing the tender pleaded to have been kept good down to the time of the trial. The pendency of a former action against the St. Mary's Congregation was also pleaded in abatement. On the trial the court ruled that the defense in abatement was insufficient, and due exception was taken to such ruling.

The evidence showed that before the action was commenced *Mueller* transferred the property purchased of plaintiff's assignor to the St. Mary's Congregation and thereby disabled himself from returning the same. There was no dispute as to the amount due plaintiff, if anything was due, and no evidence that Stemper possessed any authority, as business manager of the Art Institute, other than that which ordinarily pertains to the position of secretary and business manager of a corporation. There was some evidence tending to show that the agreed consideration for the articles purchased was capital stock in the Art Institute as alleged in the answer.

At the close of the evidence plaintiff's counsel moved the court for the direction of a verdict for $498 with interest.

That motion was denied with the understanding that the question of law presented should be considered later and that in the mean time some questions of fact should be passed upon by the jury. Such questions were thereupon submitted and the jury were instructed in regard to them. The jury, having failed to agree, were discharged, and the court then granted plaintiff's motion for judgment. Judgment was thereupon entered, from which this appeal was taken.

For the appellant there was a brief by *Gillen & Hughes*, and oral argument by *Simon Gillen*. To the point that the corporation was bound by the contract made by its secretary and business manager, they cited 4 Am. & Eng. Ency. of Law, 242, 245; *Madison, W. & M. P. R. Co. v. Watertown & P. P. R. Co.* 5 Wis. 173; *Clark v. Farrington*, 11 Wis. 306–322; *North Hudson M. B. & L. Asso. v. First Nat. Bank*, 79 Wis. 31; *Germantown F. M. Ins. Co. v. Dhein*, 43 Wis. 420; *Winterfield v. Cream City B. Co.* 90 Wis. 239; *McElroy v. Minnesota P. H. Co.* 96 Wis. 317; *Senour Mfg. Co. v. Clarke*, 96 Wis. 469; *Ford v. Hill*, 92 Wis. 188; 2 Kent, Comm. 291.

For the respondent there was a brief by *LaBoule & Hunt*, and oral argument by *F. S. Hunt*.

MARSHALL, J. If Stemper, the secretary and business manager of the St. Francis Art Institute, had no authority to trade its property for capital stock in the corporation, then, under the circumstances disclosed by the evidence, plaintiff was entitled to recover unless the ruling of the trial court was wrong as to the sufficiency of the matter pleaded in abatement.

It stands admitted that appellant, *Mueller*, purchased the property mentioned in the complaint at the price alleged, and that he disabled himself from returning the same. Therefore, obviously, he was liable on an implied promise to pay

for the property at plaintiff's election to proceed that way, if there was no agreement binding on plaintiff's assignor to receive corporate stock in payment for the property.

The matter in abatement was manifestly insufficient, as it did not show the pendency of a former suit to recover the same indebtednsss of appellant, but of a third party, the St. Mary's Congregation of Random Lake. A plea of the pendency of a former action is fatally defective unless it shows an identity of parties or privies in the two actions. *Wood v. Lake*, 13 Wis. 84.

The question of whether a corporation, unless precluded by its charter, may, acting in good faith, purchase and take title to its own capital stock, which is discussed at considerable length in the briefs of counsel, was decided in the affirmative by this court in *Shoemaker v. Washburn L. Co.* 97 Wis. 585, and an examination of the opinion in that case, written by the present chief justice, will show that the decision is supported by abundance of authority, including that of the federal supreme court. But because it is within the power of a corporation to purchase its own stock, it does not follow, by any means, that an executive officer of such corporation may, by virtue of his office, exercise that power. It cannot be claimed here that Stemper had any power other than such as was incident to his office, because there is no evidence of any special delegation of power by action of the board of directors, or any implied authority by reason of the manner in which the business of the corporation was conducted. *Ford v. Hill*, 92 Wis. 188, and similar cases relied upon by appellant, have no application to the facts before us. In each of the cases referred to the officer of the corporation whose conduct was in question had been permitted, uniformly, to exercise the whole power of the corporation, and in such circumstances it was held that the corporation was estopped from changing its position to the prejudice of those who had in good faith dealt with such officer, relying

on the appearance of power for which such corporation, through its governing board, was responsible. Did the authority incident to Stemper's official position include that of purchasing capital stock in the corporation for the purpose of effecting a sale of its manufactured product? That is the question.

It would seem that a discussion of the subject presented and citation of authorities is unnecessary to show that a mere business manager of a corporate organization does not, by virtue of his office, ordinarily possess any such extraordinary authority as that of buying in its capital stock. The power of the corporation to do that is doubted in some jurisdictions and denied in others. No court that concedes it goes so far as to hold that the power can be exercised by an officer of the corporation having no special authorization by the governing body so to do. There are many things which a corporation may do, of much less importance than that of buying its capital stock, which cannot be done by a business manager without special authority, express or implied. He cannot make a judgment note. *Ford v. Hill*, 92 Wis. 188. He cannot contract with an employee for services for an unreasonable length of time. *Comacho v. Hamilton B. N. & E. Co.* 2 App. Div. 369; *Carney v. N. Y. L. Ins. Co.* 19 App. Div. 160. He may enter into such contracts and do such acts as pertain to the regular course of corporate business under his direction, and no more. When he goes outside of that without special authority, express or implied, his acts will not be binding upon the corporation.

Applying the foregoing to the question of whether Stemper had authority to buy the capital stock of the Art Institute, it must be unhesitatingly decided in the negative. That was no part of the general business of the corporation, nor incident to such general business in any way. That business consisted in manufacturing articles of merchandise of a particular character and selling them in the ordinary course

of trade. The power to purchase capital stock in the corporation was entirely outside its ordinary business, hence was exercisable only by such corporation acting through its governing body, the board of directors. The decision of the trial court in plaintiff's favor was proper and must be affirmed. The fact that there was no formal verdict is immaterial. The case turned on a question of law, therefore a verdict, though it would have been proper, was not necessary. *Gammon v. Abrams*, 53 Wis. 323.

By the Court.—The judgment of the circuit court is affirmed.

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HALBACH, Respondent, vs. TRESTER and others, imp., Appellants.

March 14—April 4, 1899.

Promissory notes: Indorsements: Parol evidence: Foreclosure of mortgages: Deficiency judgment against indorsers.

1. If there was no fraud in securing the indorsement of a promissory note, parol evidence is inadmissible to show that the indorsers did not intend to bind themselves as such.
2. A *bona fide* purchaser of a promissory note for value before maturity is presumed to have relied upon an indorsement thereon, and the indorsers cannot show the contrary.
3. Under sec. 3156, Stats. 1898 (authorizing a deficiency judgment, in a foreclosure action, "against every party personally liable for the debt secured by the mortgage, whether the mortgagor or other persons, if upon the same contract which the mortgage is given to secure"), the indorsers of a note, whose liability has been duly fixed by demand and notice, may be joined in an action to foreclose the mortgage given by the maker as security, and a deficiency judgment may be rendered against them therein. *Cottrell v. New London F. Co.* 94 Wis. 176, distinguished.

APPEAL from a judgment of the circuit court for Sheboygan county: N. S. GILSON, Circuit Judge. *Affirmed.*

The mortgage in suit bears date April 13, 1893, and was executed by Anna Black and Frances Trester to the defendants *Henry W.*, *John J.*, and *Adam Trester*, to secure the payment of a note for $1,000, due in five years, with interest at six per cent., payable annually. On April 17, 1893, the mortgagees duly assigned said mortgage to Christine Webster, and on the back of the note signed their names to the following: "Pay to the order of Christine Webster." On June 9, 1893, this mortgage and note were transferred to plaintiff by assignment and indorsement in proper form. Default having been made thereon, notice of protest and nonpayment was duly given to the indorsers of said note.

This suit was commenced to foreclose the mortgage. The indorsers of the note were made parties defendant, and judgment against them for any deficiency was demanded. No appearance was made by any of the defendants, except the mortgagees, who answered, denying that they ever indorsed the note in suit or assured the payment thereof to the plaintiff or any one else, and alleging that if the note bore their signatures the indorsement was made under a mistake of fact and without any intention to guaranty the payment thereof, which fact was well known to the plaintiff, and that he was not a *bona fide* purchaser thereof.

The court made findings in favor of the plaintiff, and directed the entry of the usual judgment of foreclosure and sale, and, in case of a deficiency, that judgment therefor should be entered against the makers and indorsers of the note. From this judgment so entered the defendants *Henry W.*, *John J.*, and *Adam Trester* appeal.

For the appellants there was a brief by *Gillen & Hughes*, and oral argument by *Simon Gillen*. To the point that the judgment for deficiency against the indorsers was unauthorized because their contract was not the same contract which the mortgage was given to secure, they cited 2 Pingrey, Mortgages, § 2037; *Bishop v. Douglass*, 25 Wis. 696; *Fond*

du Lac H. Co. v. Haskins, 51 Wis. 135; *Gaynor v. Blewett*, 86 Wis. 399; *Plankinton v. Hildebrand*, 89 Wis. 209; *Witter v. Neeves*, 78 Wis. 547; *Cottrell v. New London F. Co.* 94 Wis. 176; *Morgan v. South Milwaukee L. V. Co.* 97 Wis. 275; *Richards v. Land & River I. Co.* 99 Wis. 625.

For the respondent there was a brief by *Benfey & Benfey*, and oral argument by *Theodore Benfey*. To the point that the parol evidence tending to alter the contract of indorsement was inadmissible, they cited Jones, Ev. §§ 437, 438, 508, 509; *Martin v. Cole*, 104 U. S. 30; *Cake v. Pottsville Bank*, 116 Pa. St. 264; *S. C.* 2 Am. St. Rep. 600; *Youngberg v. Nelson*, 51 Minn. 172; *Charles v. Denis*, 42 Wis. 56; *Dale v. Gear*, 38 Conn. 15; *S. C.* 9 Am. Rep. 353.

BARDEEN, J. 1. Plaintiff was a purchaser of the note and mortgage in suit before the same became due. At the time he took the note, it had upon the back thereof an indorsement, "Pay to the order of Christine Webster," signed by the defendants. When it was transferred to plaintiff, Mrs. Webster indorsed it blank. Their engagement, in law, was that they would pay this note at maturity, if the maker failed to pay it on demand and they received due notice thereof. *Charles v. Denis*, 42 Wis. 56. It is the same as though the contract had been written in full on the back of the note and they had signed it. The engagement which the law implies is just as sacred and inviolable as though it had been written out in full. This being so, the elementary principle that parol evidence is not admissible to vary or control its legal effect applies. This was so decided in the case before cited, and is sustained by the best judicial thought of the country. There being no claim of fraud in securing the indorsement, the trial court properly rejected the testimony by which it was sought to establish the fact that defendants did not intend to bind themselves as indorsers. The plaintiff, being a *bona fide* purchaser for value before

due, was entitled to his note in its full integrity, and in law is presumed to have relied upon all the security he received. It was therefore incompetent for defendants to show that plaintiff did not rely upon defendants' indorsement.

2. As before suggested, when the defendants indorsed the note they became holden to pay the debt secured by the mortgage, upon the conditions stated. It is in proof that due demand was made and notice of the makers' default duly given. Sec. 3156, Stats. 1898, provides that "in all such actions the plaintiff may in his complaint unite with his claim for a foreclosure and sale a demand for judgment for any deficiency which may remain due to the plaintiff after sale of the mortgaged premises against every party who may be personally liable for the debt secured by the mortgage, whether the mortgagor or other persons, if upon the same contract which the mortgage is given to secure, and judgment of foreclosure and sale, and also for any such deficiency remaining after applying the proceeds of sale to the amount adjudged to be due for principal, interest and costs, may in such cases be rendered." In construing this statute, this court said in *Palmeter v. Carey*, 63 Wis. 426: "The statute does not require that the person held liable in the foreclosure action for a deficiency must be an original contractor of the mortgage debt. Doubtless one may become a party to it after the indebtedness has been incurred by the mortgagor, as if he indorse or guaranty a note secured by mortgage after the execution of the mortgage. We think, in such case, it cannot be successfully maintained that such indorser or guarantor is not within the statute." It was accordingly held that a purchaser of the mortgaged premises from the mortgagor, who, as a part of the purchase price, assumed to pay the mortgage debt, could be held under a judgment for a deficiency. In *Fond du Lac H. Co. v. Haskins*, 51 Wis. 135, the guarantors of a mortgage debt were held liable on a personal judgment for any deficiency after sale of the

mortgaged property. The case of *Cottrell v. New London F. Co.* 94 Wis. 176, has no application to the facts here presented. In that case the contesting defendants were guarantors of the *collection* of the debt secured by the mortgage. Their contract was that they would pay the debt in case it could not, by due diligence, be collected from the mortgagor or made out of the security. Such is not the obligation of the defendants in this action, as before shown. Their engagement was absolute, and subject only to the condition that payment should be demanded and due notice of nonpayment given them. Plaintiff might have maintained an action at law against these defendants upon their indorsement. As stated by LYON, J., in the *Palmeter Case:* "The statute is purely remedial in its character. Its purpose is to avoid circuity of action, by settling in the foreclosure suit all the rights of all the parties thereto; thus avoiding the necessity of another suit to enforce a contingent liability of one of such parties. Ordinarily a court of equity will do this without the aid of a statute, but in this particular case a statutory provision in aid of the general power of the court seems to have been thought necessary, or at least desirable. Such being the character of the statute, it must receive a liberal construction to advance the purposes for which it was enacted." Under a somewhat similar statute in Michigan it was decided that the indorsers of a mortgage note which had been duly protested for nonpayment could be joined as defendants in a suit to foreclose the mortgage, and that a judgment for a deficiency against them was proper. *Michigan State Bank v. Trowbridge*, 92 Mich. 217.

Our conclusion is that the ruling of the trial court on both propositions was correct.

By the Court.—The judgment of the circuit court is affirmed.

PHILIP MEYER COMPANY, Appellant, vs. SHEBOYGAN CHAIR COMPANY, Respondent.

March 14 — April 4, 1899.

Appeal: Findings of fact.

Findings of the trial court will not be disturbed on appeal unless against the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Sheboygan county: N. S. GILSON, Circuit Judge. *Affirmed.*

Action to recover for castings alleged to have been made especially for defendant. The defendant had judgment, from which the plaintiff appealed.

For the appellant there was a brief by *Benfey & Benfey*, and oral argument by *Theodore Benfey.*

Francis Williams, for the respondent.

DODGE, J. No advantage can be gained from a discussion in the opinion of the facts in this case. Suffice it to say that, after a careful examination, we do not find any clear preponderance of evidence against the finding of the court that "the plaintiff did not manufacture for the defendant, in accordance with its order and agreement, the articles sued for, and did not deliver the same to said defendant in accordance with any agreement to purchase the same by said defendant," whether that finding is intended to repudiate the making of an agreement in fact by defendant's foreman, or his authority on their behalf. That finding sustains the judgment.

By the Court.— Judgment affirmed.

THE RIDER-WALLIS COMPANY and others, Respondents, vs. FOGO and another, Appellants.

March 14—April 4, 1899.

Insolvency: Receivers: Constitutional law: Trial by jury: Judicial power: Judge at chambers: Evidence.

1. Sec. 1694*b*, Stats. 1898, authorizing the appointment of a receiver for the nonexempt property of an insolvent debtor without a determination by a jury of the existence of the requisite facts, is not in violation of sec. 5, art. I, Const., providing that "the right of trial by jury shall remain inviolate," etc., since that language relates only to the right as it existed when the constitution was adopted.
2. Even if sec. 1694*b*, Stats. 1898, is invalid, under sec. 2, art. VII, Const., so far as it attempts to empower a circuit judge at chambers to appoint a receiver of the property of an insolvent debtor, yet it is valid so far as it vests such power in the court.
3. Under sec. 1694*b*, Stats. 1898 (providing that upon petition by creditors of an insolvent debtor for the appointment of a receiver, the court shall proceed summarily "to hear the parties and receive such evidence as may be proper, and if it shall appear to the court" that the debtor is insolvent, etc., the court shall appoint a receiver), it is error to appoint a receiver without evidence, even though the debtor does not answer or appear in the proceeding.

APPEAL from an order of the circuit court for Richland county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

For the appellants the cause was submitted on the brief of *F. W. Burnham* and *Fruit & Gordon.*

For the respondents there was a brief by *H. M. Lewis* and *M. S. Dudgeon*, and oral argument by *Mr. Dudgeon.*

CASSODAY, C. J. This is an appeal from an order of the circuit court dated May 31, 1898, appointing George Wulfing as receiver of all the nonexempt property of *J. W. H. Fogo*, pursuant to ch. 334, Laws of 1897 (sec. 1694*b*, Stats. 1898), made at the hearing of an order to show cause granted by a county judge April 12, 1898, based upon the petition of

three several creditors of *Fogo*, and to whom he owed debts to the amount, in the aggregate, of $821.94, signed by such creditors, and verified by their attorney, April 8, 1898, alleging, in effect, that they were such creditors; that *Fogo's* only nonexempt property consisted of stocks of goods and merchandise, and his store furniture, fixtures, etc., and credits and accounts; that March 26, 1898, *Fogo*, being insolvent and indebted to divers persons, among others the *State Bank of Richland Center*, to which he was indebted $3,057.06, and with intent to give preference to that bank, with his wife executed and delivered to that bank a chattel mortgage upon a portion of such nonexempt property, and duly filed the mortgage on that day; that at other times within thirty days prior to filing such petition *Fogo* committed certain other acts of insolvency, by confessing judgment and making conveyances to certain other creditors to secure preferences. The petition prayed for a time and place of hearing, upon notice, and that *Fogo* might be adjudged to have been insolvent at the time of making the mortgage, and for the appointment of a receiver, and that *Fogo* be directed to make and file an inventory of his property and list of his creditors, and for an injunction.

The order to show cause having been served on *Fogo* and the *State Bank of Richland Center* April 12, 1898, the *State Bank of Richland Center* made answer to such petition by its cashier filing an affidavit stating, among other things, in effect, that the chattel mortgage was given to secure a *bona fide* indebtedness evidenced by three notes then actually due, and for the sole purpose of securing the payment thereof; that after the execution and delivery of the mortgage *Fogo*, by agreement with the bank, sold goods from his Boscobel store to the amount of $850, and applied the proceeds thereof as so much paid on such notes and mortgage; that afterwards, and before the order to show cause, *Fogo* sold to the bank all the property covered by the mortgage in Richland

Center at the agreed price of sixty per cent. of its invoice price, and applied the proceeds thereof in payment and satisfaction of a part of the balance due on such notes and mortgage; that the total proceeds of all the property included in the mortgage had been actually applied on such indebtedness of the bank; that none of such transactions were with intent to evade the statutes; and that the bank had no knowledge, at any of the times mentioned, as to whether *Fogo* was insolvent or had committed any other acts of insolvency. *Fogo* did not answer or appear in the proceedings.

To such answer of the bank the petitioning creditors demurred *ore tenus*. By the order appealed from the court sustained such demurrer and adjudged that *Fogo* was an insolvent debtor, within the meaning of the statute, at the time of executing the chattel mortgage, and appointed such receiver, with directions to take and recover all property wrongfully disposed of by *Fogo*.

1. If the facts stated in the petition were all established as required, then there would be no difficulty in holding that the case came within the letter of the statute requiring the appointment of a receiver. Laws of 1897, ch. 334 (Stats. 1898, sec. 1694*b*).[1] We are met, however, at the threshhold

[1] Sec. 1694*b*, Stats. 1898, provides that when any insolvent debtor does or fails to do certain acts, by reason of which one or more of his creditors obtain a preference, "any two or more of his creditors holding and owning debts or claims of not less than two hundred dollars in the aggregate may make a petition to the circuit court or a judge thereof in the county or circuit where such debtor resides, if a resident of this state, and if not, in any county thereof, setting forth therein such matters and facts as may be pertinent, and after notice given in such manner as the court or judge may direct to the debtor and creditors sought to be preferred or to their attorney of record, of the time and place of hearing, the court in term time or a judge in vacation shall proceed summarily upon such petition to hear the parties and receive such evidence as may be proper, and if it shall appear to the court or judge that the debtor is insolvent and has given a preference to any of his creditors over other

of the discussion, with the objection that the statute is in violation of that provision of our state constitution which declares that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy." Const. art. I, sec. 5. This court has uniformly held that this language imports that such right must remain as it existed when the constitution was adopted. *Klein v. Valerius*, 87 Wis. 60, and cases there cited. The right is not granted by the constitution, but only secured. *Id.* This court has gone so far as to hold that the legislature cannot take anything from the original or primary jurisdiction of equity and give it to the law, nor the reverse. *Deery v. McClintock*, 31 Wis. 195. See, also, *Oatman v. Bond*, 15 Wis. 20; *Truman v. McCollum*, 20 Wis. 360; *Callanan v. Judd*, 23 Wis. 343; *Klein v. Valerius, supra.* In considering the question of jury trials in lien cases, Mr. Justice LYON, speaking for the court, said: "It is competent for the legislature, when it gives a new remedy, to prescribe the procedure by which the remedy may be enforced. It may prescribe a purely equitable or a purely legal procedure, or it may blend the two, as it has done, conditionally, in the statute under consideration." *Bentley v. Davidson*, 74 Wis. 424. In England, by statutes relating to bankrupts, a summary jurisdiction was given to the chancellor. 3 Bl. Comm. 428. Certainly there was no right at common law to a jury trial in order to adjudge a man a bankrupt or an insolvent. It has long since been held in Massachusetts, under similar statutes, that "the provision of the insolvent laws which authorizes the issuing of a warrant to take possession of all the estate of a debtor, on the petition of a creditor, without a trial by jury on the facts alleged in the petition, is constitutional." *O'Neil v. Glover*, 5 Gray, 144.

of his creditors or any of them, or has refused or neglected to make an assignment of his property as hereinbefore provided, the court or judge shall appoint a receiver," etc.

A similar statute to ours has been held to be constitutional in Minnesota. *Weston v. Loyhed*, 30 Minn. 221; *Wendell v. Lebon*, 30 Minn. 234. A Michigan case is cited to the contrary. *Risser v. Hoyt*, 53 Mich. 185. But only two judges concurred in that view of the case. Chief Justice COOLEY, who was at the time a member of the court, was manifestly of a different opinion; and in a note to his sixth edition of Cooley, Const. Lim., he seems to refer to it as an exceptional case. Pages 504, 505. See, also, *Rouse v. Donovan*, 104 Mich. 241.

The supreme court of the United States has repeatedly held that "a trial by jury in suits at common law pending in the state courts is not a privilege or immunity of national citizenship which the states are forbidden by the fourteenth amendment of the constitution of the United States to abridge." *Walker v. Sauvinet*, 92 U. S. 90. In that case Chief Justice WAITE, speaking for the whole court, said: "Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state." *Bittenhaus v. Johnston*, 92 Wis. 597, and cases there cited. As stated by a recent text writer: "The guaranty of due process of law does not require that all trials should be before a jury. Its effect is not to give the right of trial by jury in cases in which it did not exist when the constitution was adopted, but only to perpetuate such right in all cases in which it was a part of the usual course of administration of justice through the courts at such time." 10 Am. & Eng. Ency. of Law (2d ed.), 305. In the language of a very learned judge, speaking for the supreme court of the United States: "Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases that kind of procedure is due process of law which is

suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." *Ex parte Wall*, 107 U. S. 289.

2. Counsel contends that the act is in violation of sec. 2, art. VII, of our state constitution, in that it vests judicial power in a circuit judge at chambers. This court has held that a statute which empowered a circuit judge at chambers to render a valid judgment upon a frivolous demurrer was a valid enactment. *Clapp v. Preston*, 15 Wis. 543. See some of the cases cited. But we do not feel called upon to determine whether that part of the statute vesting such judicial power in a circuit judge at chambers is or is not valid, since the order in this case is made by the court. Even if the act should be held void so far as it undertakes to vest such power in a circuit judge at chambers, still it would be valid so far as vesting such power in the court. So far as the case before us is concerned, the act is held to be valid.

3. The statute provides, in effect, that "the court shall proceed summarily upon such petition to hear the parties and receive such *evidence* as may be proper, and if it shall appear to the court" that the debtor is insolvent, and has given a preference, and has refused or neglected to make an assignment, the court shall appoint a receiver, etc. Stats. 1898, sec. 1694*b*. Here no evidence was taken. *Fogo* simply made default. We think the statute clearly contemplates the taking of evidence, and that it was error to appoint such receiver without evidence. Under a similar statute it has been expressly held in Massachusetts that "the facts stated in a creditor's petition under the insolvent laws must be proved by legal and competent evidence, and it seems that taking the testimony of a material witness without oath or affirmation is ground for setting aside the proceedings." *Merriam v. Sewall*, 8 Gray, 316; *Ex parte Jordan*, 9 Met. 292, 296; *Stearns v. Kellogg*, 1 Cush. 449. See also *Shove v. Mani-*

towoc, 57 Wis. 5; *State ex rel. Smith v. Gaylord*, 73 Wis. 315; *Hixon v. Eagle River*, 91 Wis. 651.

By the Court.— The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

STRONG, Appellant, vs. BOWES and another, Respondents.

March 14—April 4, 1899.

Pledge: Application of payments: Promissory notes.

One T., with whom a note indorsed in blank had been deposited for safe-keeping, borrowed money from plaintiff and gave him said note as collateral security, the plaintiff receiving the same in good faith, with no knowledge of any defect in T.'s title thereto. When said note became due the other collaterals in plaintiff's hands were sufficient in value to discharge T.'s indebtedness to him, but it had not been discharged. Sometime later T. borrowed a further sum from plaintiff, agreeing that all the collaterals then in the plaintiff's hands should be held as security for it as well as for the prior debt. Subsequently the makers paid to T. the amount of the note and took a receipt, T. claiming that the note had been mislaid and promising to send it when found. T. became insolvent, and the collaterals were insufficient to pay his indebtedness to plaintiff. *Held*, that plaintiff might apply the other collaterals to the payment of the second loan to T., and hold the note in question to secure the first, for which it was pledged before its maturity.

APPEAL from a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit Judge. *Reversed.*

This is an action upon a promissory note, commenced June 25, 1897. There is no bill of exceptions. The action was tried by the court, who made findings of fact as follows:

"(1) That on the 9th day of March, 1896, the defendants executed and delivered to D. W. Bowes their promissory

note for $276, payable one year after date, with interest at seven per cent., at Cobb, Wisconsin.

"(2) That the payee, D. W. Bowes, shortly after the making of the note, sold it to John Cox, and at the time of the sale indorsed it in blank.

"(3) That on May 12, 1896, Cox left the note thus indorsed with Edward F. Thomas, a merchant of Cobb, for safe-keeping and collection when due.

"(4) That Thomas on the day last named was indebted to the plaintiff, a banker in Dodgeville, on a note and for overdrafts, to the amount of between $1,600 and $1,700, to secure which indebtedness the plaintiff held collateral which Thomas had deposited with him.

"(5) That on May 13, 1896, Thomas arranged with the plaintiff to loan him (Thomas) $1,800 more, and on that day he gave to the plaintiff his (Thomas's) note for this sum, payable one day after date, the understanding at the time between the two being that the plaintiff should furnish to Thomas money as he might call for it and as he might furnish collateral therefor, to the amount of said note.

"(6) That by the 19th day of June, 1896, all of said $1,800 had been advanced by the plaintiff to Thomas upon collateral security, a part of which was said note belonging to Cox, which Thomas had wrongfully appropriated and indorsed with his name in blank before he delivered it to the plaintiff, who received it in good faith.

"(7) That for a time the securities received as collateral for said $1,800 note were kept separate from the securities held by the plaintiff for said prior indebtedness, and, as collections were made upon the securities, the amounts received were applied upon the particular indebtedness for which they were pledged, but about September, 1896, it was agreed between the plaintiff and Thomas that all the collateral securities should be held by the plaintiff as security for all the indebtedness of Thomas to him.

"'(8) That on March 9, 1897, the day when the said $275 note given by the defendants, and wrongfully transferred by Thomas to the plaintiff as collateral, became due, the other collateral held by him was ample to pay all of the indebtedness then owing to the plaintiff by Thomas; and before the commencement of this action enough had been collected, or otherwise realized thereon, to the satisfaction of the plaintiff, to discharge all of Thomas's indebtedness existing on that day, unless, by reason of the subsequent transaction now to be set forth, the plaintiff might properly apply, as he did, a part of what he received on such other collateral to the discharge of a subsequent loan made to Thomas, and hold the note in question as collateral for what would remain due upon said $1,800 note, after applying towards its payment the proceeds of said other collateral, less the part thereof taken to discharge said subsequent indebtedness.

"(9) That forty-one days after said note became due — that is, on April 19, 1897 — Thomas borrowed of the plaintiff $280, for which Thomas gave the plaintiff his note. At the time this last loan was made it was agreed between Thomas and the plaintiff that the latter should hold all of the collateral, including the note in suit, for the payment of this $280 note, as well as to secure the payment of the previous indebtedness.

"(10) That on April 30, 1897, the defendants went to Thomas at his store in Cobb, supposing that their note, which Cox had left with him for collection, was in his possession, and paid to him the amount due thereon, and demanded the note. Thomas told them that he had mislaid it, but would find and hand it to them, and for the present would give them a receipt showing that it was paid. This satisfied them. Whether Thomas paid over to Cox the money the defendants paid him on the note the testimony does not show.

"(11) That the collateral placed in the hands of the plaint-

iff by Thomas, including said note given by the defendants, proved insufficient to pay the indebtedness of Thomas to the plaintiff, including said note of $280, made April 19, 1897, by $167.55, and it is to recover this sum on their said note that this action is brought against the defendants.

"(12) That in May, 1897, Thomas failed in business, and was found to be deeply insolvent."

Upon these facts judgment for the defendants was rendered, and the plaintiff appeals.

Aldro Jenks, for the appellant.

J. P. Smelker, for the respondents.

WINSLOW, J. It is conceded that the plaintiff acquired a good title to the note in suit, and the right to hold the same as collateral security for the repayment of the $1,800 loaned by the plaintiff to Thomas under the agreement of May 13, 1896, because said note was then indorsed in blank by the owner, and in the possession of Thomas, and received by the plaintiff in good faith, with no knowledge of any defect in the title of Thomas thereto. This being the case, we agree with plaintiff's counsel that the controlling question in the case is simply a question of application of payments. A considerable amount of other collaterals were held by the plaintiff as security for the $1,800 loan. On March 9, 1897, when the note in suit fell due, the other collaterals in plaintiff's hands were sufficient in value to discharge the $1,800 debt, but it had not been discharged. April 19, 1897, Thomas borrowed $280 more of the plaintiff upon his note, and agreed that all the collaterals then in plaintiff's hands should be held as security for it. It may be conceded that this agreement could not affect the note in suit, because it was then past due, but this did not prevent the plaintiff from applying the other collaterals which he held to pay the $280 note, and holding the note in suit to secure the indebtedness of $1,800, for which it was rightfully pledged. This is what

the court finds was done, and this the plaintiff manifestly had a perfect right to do. By so doing he has simply enforced his admitted right to hold the note as collateral for the $1,800 debt, which right he acquired on the 19th of June, 1896.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the plaintiff in accordance with this opinion.

JARVIS, Respondent, vs. NORTHWESTERN MUTUAL RELIEF ASSOCIATION, Appellant.

March 14—April 4, 1899.

Insurance: Permanent disability: Amendment of pleading: "Due proof" of claim: Additional causes of disability: Appeal: Findings.

1. In an action on an insurance contract to recover for an incurable disability permanently incapacitating the assured to perform manual labor, where the complaint alleged paralysis as the cause of such disability, it was proper to permit an amendment alleging disease of the heart and nervous system as additional causes, although the claim filed with the insurer had stated the cause of the disability as paralysis only, and the contract barred all claims not filed within six months of the maturity of the contract.
2. "Due proof" of a claim, required by an insurance contract, means such a statement of facts, reasonably verified, as, if established in court, would *prima facie* require payment of the claim; and the statement of one adequate fact in the proofs will not exclude others omitted through mistake or ignorance.
3. Where the evidence is conflicting fair doubts are to be resolved in favor of the conclusions of the trial court, and its findings will not be disturbed unless against the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for Crawford county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

Action on an insurance contract to recover a sum stipu-

lated to be paid to the assured in case of an incurable disability rendering him permanently incapacitated to perform any and all manual labor. Proof of the claim was required to be filed with the assurer sixty days before the maturity of the contract. The complaint stated all facts requisite to a recovery, alleging, as the cause of the disability, paralysis. The answer put in issue all allegations as to the incurability of plaintiff's disability. Near the close of the trial the court allowed the complaint to be amended by alleging disease of the heart and of the nervous system as causes of plaintiff's disability, in addition to paralysis. Defendant's counsel objected to the amendment on the ground that all claims under the insurance contract not filed in writing within six months after the maturity of the contract, except in case of maturity by limitation, were barred by its terms.

As the case was submitted for decision, the only disputed fact was as to whether plaintiff, at the time stated in the complaint and down to the time of the trial, was affected with an incurable malady rendering him totally incapable of performing manual labor. That question was found in plaintiff's favor, and that the disability was caused by paralysis and by disease of the heart and of the nervous system. The conclusion of law followed, that plaintiff was entitled to judgment, which was rendered accordingly, and from which this appeal was taken.

Frank E. Parkinson, for the appellant, contended, *inter alia*, that the plaintiff was bound to set out in his proofs of loss all his infirmities, paralysis and heart disease. *Lycoming Co. M. Ins. Co. v. Updegraff*, 40 Pa. St. 311; *Beatty v. Lycoming Co. M. Ins. Co.* 66 Pa. St. 9; *Blakeley v. Phœnix Ins. Co.* 20 Wis. 255; *Towne v. Springfield F. Ins. Co.* 145 Mass. 582; *O'Brien v. Commercial F. Ins. Co.* 63 N. Y. 108, 112; *Maher v. Hibernia Ins. Co.* 67 N. Y. 283, 288. He must set them all out and set them out truly. *Shallow v. Salem*, 136 Mass. 136. Where the proofs set out one matter which

is defensible and on which the company has relied and based its defense, the plaintiff is bound and cannot set up a new matter on the trial. Cooke, Life Ins. § 119; *Campbell v. Charter Oak F. & M. Ins. Co.* 10 Allen, 213; *Irving v. Excelsior F. Ins. Co.* 1 Bosw. 507; *Insurance Co. v. Newton*, 22 Wall. 32; *Cluff v. Mut. B. L. Ins. Co.* 99 Mass. 317; *Phillips v. N. Y. L. Ins. Co.* 9 N. Y. Supp. 836.

For the respondent there was a brief by *O. B. Thomas* and *W. S. Manning*, and oral argument by *Mr. Thomas.*

MARSHALL, J. Appellant's assignments of error requiring notice, though five in number and several of them subdivided, may be properly stated as two: (1) Did the court err in granting the amendment to the complaint, alleging other causes for plaintiff's disability than paralysis? and (2) Is the finding of fact, on the subject of permanent disability incapacitating plaintiff from performing any manual labor, contrary to the clear preponderance of the evidence?

The ground of objection to the amendment was that the articles of organization of the company barred all claims for benefits not filed in writing with the secretary of the company within six months after maturity of the certificate other than maturity by limitation. That was also a part of the rules and regulations attached to and made a part of the insurance contract. We fail to see how that affected the question of the propriety of the amendment alleging additional facts in support of a claim seasonably filed. The filing of the claim in writing was admitted. The foundation of the claim was total disability to perform manual labor. The amendment broadened out the alleged cause of the disability. That was all. It was not a new claim, but additional facts in support of the old claim. The material thing was total incapacity to perform manual labor because of an incurable disability. A mistake in the real cause of the disability was by no means fatal to the claim, there being nothing in the insurance contract indicat-

ing any such result. The idea of appellant's counsel seems to be that, if the conditions requisite to the maturity of the contract existed and *prima facie* proof of them was made assigning an adequate cause therefor, a mistake as to the cause was fatal to a recovery. Such a construction of the insurance contract would be exceedingly unreasonable,— would add, we may say, something not found in the language used in the contract by any rational construction of it, and would be contrary to all authority on the question. The contract required due proof of the claim. That gave the assurer, necessarily, authority to require reasonable proof of the existence of the conditions upon which the claim against the company under the contract was based. The term "due proof" did not require any particular form of proof which the assurer might arbitrarily demand, but such a statement of facts, reasonably verified, as, if established in court, would *prima facie* require payment of the claim. The statement of one adequate fact in the proofs did not exclude others omitted through mistake or ignorance. The same rule applies as in case of a life or fire policy. In the former, death is the essential thing. Assigning in good faith a wrong cause of death, in the proof of the maturity of the policy, is not binding on the beneficiary. So, under a fire policy, loss by fire is the main thing; but assigning in good faith a wrong cause for the fire in the proof does not preclude a recovery or militate against proof of other causes being produced on the trial under proper pleadings. It is uniformly held that "due proof" calls only for such as the law will pronounce reasonable and satisfactory. This is well illustrated in *Insurance Co. v. Rodel*, 95 U. S. 232, where the requirement in the life policy was that the beneficiary should furnish satisfactory evidence of death and of the justice of the claim of the assured, and excepted from the risk death of the assured by his own hand. The proof showed that the death of the assured occurred that way without suggesting that he was insane at the time. It

was insisted by the insurance company that there could be no recovery because the proof did not show the existence of facts rendering the company liable notwithstanding the assured died by his own hand. The court, by Mr. Justice BRADLEY, said in substance that proof of the death of the assured, called for by the insurance contract, did not require a statement of the cause of death, and that even the statement of a cause which *prima facie* exempted the company from liability was not fatal to an action on the policy; that where proof of death was made and it was not objected to by the company, the call for proofs under the contract was satisfied though they disclosed facts by which the insurer could avoid the policy by a defense to an action on it, and that the beneficiary could recover if the essential fact of death existed and came about by a cause rendering the company liable, though such cause was not fully stated in the proof; that though the proofs showed the existence of facts suggesting to the company the propriety of refusing payment and standing suit, that was no bar to the bringing of a suit, otherwise no suit could be brought until the parties had gone through an extrajudicial investigation resulting favorably to the assured. To the same effect is *Buffalo L. T. & S. D. Co. v. Knights Templar & M. M. A. Asso.* 126 N. Y. 450, where the language of the insurance contract called for satisfactory proofs of death, and it was held that a correct statement of the cause of death was not required; that the beneficiary performed his legal obligation when he furnished due proof of the fact of death. Further on the same subject is *Conn. Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593, where it was held that an incorrect statement of fact in proofs of loss made in good faith does not estop the beneficiary from proving the truth under proper pleadings, when a correct statement of the facts in the proofs of loss is not a condition precedent to a recovery on the policy. Doubt is expressed as to that even being sufficient to work a forfeiture. For fur-

ther discussion of the subject, see *Bachmeyer v. Mut. R. F. L. Asso.* 87 Wis. 325; *Parker v. Amazon Ins. Co.* 34 Wis. 363; Beach, Ins. §§ 1227, 1228; Joyce, Ins. § 3319, and cases cited.

It will be noted that in the insurance contract in this case there is no requirement except that due proof of the claim shall be filed, and no language forfeiting the right of recovery for failure to comply with the requirement as to such proof, and in fact no requirement on the subject of proof except that giving the company the right to demand reasonable proof of the maturity of the claim, which, of course, as before indicated, required plaintiff to conform to the reasonable rules of the company by stating in good faith the true situation. So far as the evidence goes in this case, all those requirements seem to have been complied with. It does not appear that plaintiff knew anything about the real cause of his disability at the time he made his proofs, other than that he was suffering from paralysis.

It follows that, on reason and authority, the trial court correctly ruled that the additional facts in respect to plaintiff's disability might be pleaded by way of amendment on the trial, subject to the right of defendant to call witnesses as to such facts and to a continuance for the purpose if necessary. It follows also that evidence in regard to the additional reasons for plaintiff's disability was properly received, and that the facts in that regard were properly considered in determining whether plaintiff was totally disabled from performing manual labor within the meaning of the contract of insurance at the time his claim against the defendant was filed and down to the time of the trial.

On the question of whether the finding of the trial judge, as to whether plaintiff was incurably disabled from performing manual labor as alleged, is contrary to the clear preponderance of the evidence, the conclusion must be in the negative. A careful consideration of the evidence satisfies us that it

fairly supports the finding. As has often been said, a trial judge has such superior advantages for elucidating the truth from evidence produced before him, over appellate courts that do not hear the witnesses testify, that the presumptions are in favor of his conclusions, and such presumptions must prevail unless the weight of evidence be manifestly the other way. In saying that it is not intended to carry with it any indication that evidence is not examined here with all the care requisite to an original decision, so far as the circumstances will reasonably permit that to be done; but such circumstances are so inferior to those enjoyed by the judge who sees the witnesses and hears them testify that fair doubts are resolved in favor of his conclusions as the method best calculated to effectuate justice with reasonable certainty.

By the Court.—The judgment of the circuit court is affirmed.

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SCHIERL, Executrix, Respondent, vs. NEWBURG and another, imp., Appellants.

March 15 — April 4, 1899.

Appeal: Findings: Absolute deed or mortgage?

A finding of the trial court that a deed absolute in form was intended as an absolute conveyance and not as a conveyance by way of security is *held* to be against the clear preponderance of the evidence.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

On November 26, 1895, the defendant *Catherine Newburg* was, and for a long time prior thereto had been, the owner and in possession of the premises described in the complaint. At that time the land was incumbered by six mortgages.

The two junior mortgages — one for $500, and the other for $1,000 — were held by the plaintiff to secure him against liability on certain notes indorsed by him for the defendants. The mortgage debts against the land at that time, with back taxes, amounted to about $4,000. On the date above mentioned, the parties met in the office of Mr. Daniels, an attorney, and a deed for the premises to plaintiff was drawn up, and executed by defendants. Whether it was delivered on that day, or the next, is one of the disputed facts in the case. On November 27th the parties again appeared at the attorney's office, and the plaintiff then executed and delivered to the defendant *Catherine* a land contract, by the terms of which she bound herself to pay plaintiff the sum of $4,000, with seven per cent. interest, payable annually, in annual instalments of $500 each, besides the taxes on the land. Upon such payments being made, plaintiff agreed to convey the land to her, clear of all legal claims, except taxes. Payments were not made as agreed. The plaintiff then brought this action to foreclose the land contract.

The defendants answered by way of counterclaim, to the effect that the plaintiff agreed to take up and assume the mortgage debts on the farm, take a deed for the same, and hold it, allowing the defendant *Catherine* to repay the amount thereof at the rate of $500 annually, and, upon such payments being made, to reconvey the land. The defendants admitted failure to pay certain taxes and the first instalment due on the contract. Their demand for relief was that the deed be declared a mortgage.

The court found that the deed mentioned was fully executed and delivered on November 26, 1895; that $4,000 was the full value of the land, and a fair consideration for the sale of the same; that it was the intention of the parties that the deed should be an absolute conveyance of the premises; that the contract to convey the lands correctly

stated the intention of the parties; and that it was not the intention to create a mortgage by the deed and land contract. He also found that defendants were in default under the contract, and directed a judgment of strict foreclosure. The defendants appeal from the judgment so entered.

After the case reached this court the plaintiff died and the action was revived in the name of his executrix. The word "plaintiff" in the opinion refers to the deceased.

John A. Daniels, for the appellants.

For the respondent there was a brief by *Winter, Esch & Winter*, and oral argument by *W. C. Winter*.

BARDEEN, J. The main controversy is whether the transaction between the parties was an absolute sale of the land or in effect a mortgage. The principle has long been established and frequently recognized, in this court, that oral evidence is admissible to show that a deed absolute on its face was in fact executed as security for a debt, and was therefore a mortgage. *Plato v. Roe*, 14 Wis. 453; *Sweet v. Mitchell*, 15 Wis. 641; *Kent v. Agard*, 24 Wis. 378; *Ragan v. Simpson*, 27 Wis. 355; *Nightingale v. Barens*, 47 Wis. 389; *Lamson v. Moffat*, 61 Wis. 153. An expression frequently used in the cases is "that whenever property is transferred, no matter in what form or by what conveyance, as the mere security for a debt, the transferee takes merely as a mortgagee, and has no other rights or remedies than the law accords to mortgagees." *Hoile v. Bailey*, 58 Wis. 434; *Starks v. Redfield*, 52 Wis. 349; *Howe v. Carpenter*, 49 Wis. 697; *Merchants' & M. S. Bank v. Lovejoy*, 84 Wis. 601; *Schriber v. Le Clair*, 66 Wis. 579.

There are a few facts in this case upon which all parties agree. Briefly, they may be stated as follows: That the defendant *Catherine Newburg* was the owner of the land in question, and in possession thereof, and that plaintiff has never had possession; that the land was incumbered by at

least six mortgages, the plaintiff holding the two junior securities; that the debts against the property on November 26, 1895, amounted to about $4,000; that some of the mortgagees were pressing payment; that the deed under which plaintiff claims bears date November 26, 1895, and the land contract on the following day; that both the deed and contract eventually came to the hands of the parties entitled thereto; that plaintiff has paid about $2,200 of the indebtedness against the farm; that he purchased the Johnson note and mortgage after he received the deed, and took an assignment thereof to himself, instead of having the same satisfied; and that he still holds said mortgage and note and has not delivered any of the securities or notes he has paid to the defendants. These are undisputed facts.

Upon the disputed questions in the case the court held with the plaintiff; and, unless we can say that the evidence is clear that it was the real intention of the parties that the transaction was to be a mortgage, his findings ought not to be disturbed. *Becker v. Howard*, 75 Wis. 415.

There was a sharp conflict in the testimony as to just what occurred in Mr. Daniels's office at the time the deed was drawn. Both defendants and the scrivener say the deed was drawn and executed on the 26th, but not delivered; that after the deed was drawn the plaintiff said he did not believe he would close the matter up then, as he wanted to see how much there was due on the paper he had indorsed; that he went home, and the parties came back the next day, when the deal was consummated, and both deed and contract were then delivered. Plaintiff swears that the deed was delivered on the 26th, and that the contract was an afterthought, and made in pursuance of an agreement with defendants after the deed was delivered. He does say, however, "I refused to sign the deed in Daniels's office on the 26th, and said I wanted to look the matter up and find out how much *Newburg* was owing me." Just what he meant by saying, "I

refused to sign the deed," is not clear, but the fact that he wanted to find out how his account stood with *Newburg* is confirmatory of Daniels's statement that the transaction was not closed on the 26th. Plaintiff's bookkeeper testified that, to the best of his recollection, the deed was delivered to plaintiff on the 26th, and put in the safe.

When viewed in the light of the surrounding circumstances, we are quite clear that the finding of the court is against the clear preponderance of the evidence. Mr. Daniels is positive that he kept the deed himself over night, and that both deed and contract were delivered together. His testimony is also quite clear and satisfactory as to what transpired in his office, leading up to the execution and delivery of these papers. The conclusion is almost irresistible that plaintiff was to take up the indebtedness against the land and allow the defendants to pay him back at the rate of $500 per year. The plaintiff's acts are consistent with this theory, and utterly inconsistent with any other theory. If he did come, as he claims, to be the absolute owner of this farm, why should he take an assignment of the Johnson mortgage? Speaking of the notes he had indorsed and the mortgage he had paid, he said: "I was to keep them, or could keep them, until the time when the contract became a deed." And again: "I have taken an assignment of the Johnson mortgage to myself. I was willing to deliver up these notes that I had paid, at any time when the contract and everything was settled." If he had made an absolute purchase of this land upon the consideration that he was to pay the claims against it, there was nothing to be settled, in that respect. All parties agree that they had figured up the amount of these outstanding debts, and that they amounted to the sum mentioned as the consideration in the deed, and also in the contract to reconvey. The principle recognized in the authorities is that once a mortgage always a mortgage. *Hunter v. Maanum*, 78 Wis. 656. So, when the parties' acts are only consistent

with the theory of the continued existence of the mortgage debt, that fact is bound to have considerable persuasive force in passing upon oral disputes. We are therefore unable to reconcile the plaintiff's conduct with his statement of what the transaction really was. We are convinced that the court's findings are contrary to the intentions of the parties, and contrary to the actual fact. The deed, though absolute in form, was a conveyance by way of security, and therefore necessarily a mortgage. The contract, although purporting to be a contract of purchase, was merely a defeasance of the contemporaneous deed. Plaintiff's rights in the premises are no greater than those of a mortgagee, and as such he must enforce them. The defendants having set up the facts in their answer, and admitting themselves to be in default, there seems to be no good reason why full and adequate relief may not be granted in this action. The judgment of the circuit court will therefore be reversed, and the case remanded with directions to enter the usual judgment of foreclosure and sale as provided in cases of mortgages.

By the Court.— So ordered.

IN RE CALLAHAN.

March 15 — April 4, 1899.

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Insolvent debtors: Discharge: Burden of proof: Practice: Inventory: Exemptions: Appeal: Findings.

1. Although the requirements of ch. 179, R. S. 1878, in respect to an insolvent debtor seeking a discharge from his debts literally relate only to the procedure, namely the filing of the necessary papers, etc., yet under the provision of sec. 4296, that an assignment shall be directed if it shall appear that the insolvent "has in all respects conformed to the *matters required of him* in this chapter," not only the filing of the papers should be shown but also the existence of the facts required to be stated therein.

2. The burden of proof is at all times upon the debtor in such a case, and the court is entitled to the utmost frankness and the fullest explanation before it can be satisfied of the material facts, especially if any suspicious circumstances appear.
3. The uncorroborated testimony of the debtor in such a case, that he was a physician and commenced practice in 1891; that his business had been prosperous, so that up to 1896, the year after a claim for malpractice was made against him, he had not only supported his family and accumulated reasonable library and apparatus, but had built an expensive homestead costing some $4,800, and had paid over to his wife some $2,000 claimed to have been borrowed of her; and that at the time of his petition, but a little more than a year thereafter, he had absolutely nothing except a list of accounts worth but $100 or $200, is *held* insufficient to warrant his discharge, especially when discredited by the facts that he ceased to keep a bank account almost immediately after the rendition of a large verdict against him on the claim for malpractice; that he kept none thereafter, although one was kept by his wife; that no explanation whatever was given of the disposal of his professional income since that time; that he accounted for the loss of his case book in which charges for professional services were made by the improbable story that it had been stolen, and testified that the inventory of 125 debtors owing for professional services was made from memory after the alleged theft.
4. It is better practice under ch. 179, R. S. 1878, for the insolvent debtor to comply with the letter of the statute and schedule "all his estate," including exempt property, even if it is not absolutely necessary to include the exempt property.
5. The decision of the trial court, if supported by the evidence, will not be reversed for want of findings of fact, especially in a special proceeding.

APPEAL from an order of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

On December 28, 1897, *John L. Callahan*, a physician in La Crosse, filed his petition alleging insolvency and praying a discharge from his debts under ch. 179, R. S. 1878. His schedule of creditors contained a few accounts for household expenses aggregating about $180, a secured debt to a bank of $110, and a judgment for $3,971.42 recovered in the circuit court for La Crosse county on October 19, 1897, upon a

verdict rendered May 17, 1897. The schedule of assets consisted of about 125 open accounts for professional services, a silver watch, and some office furniture. It appeared by his testimony that he had, in addition, items of personal property omitted as exempt from execution,—professional library, $150 or $200; surgical instruments, $150; operating chair, $50; two horses, $100; a buggy, $25; and a cutter, $25. There was substantially no evidence except his own testimony, from which it appeared that he completed his medical course and settled in La Crosse in 1891, where his practice very soon became lucrative; that in October, 1895, he attended professionally *Emily A. Peterson;* and that on December 28, 1895, he received a demand from her attorneys to settle a claim for malpractice in treating her, which afterwards resulted in the judgment above mentioned, and also in a suit by her husband for damages in the same connection. He testified that on coming to La Crosse he was indebted to his wife for moneys obtained from her to purchase a former homestead in Merrill, and to support himself while pursuing his medical studies, in about the sum of $2,000, and that he had paid that to her in the interval commencing in 1891; that in December, 1895, to apply on that debt, he assigned to her a mortgage of $235. In 1896 he deeded to her his homestead in La Crosse, representing a cost of some $4,800, wholly without consideration. It also appeared that his wife made a transfer in May, 1897, of a $400 mortgage, and of $1,000 par value of bank stock standing in her name. These transactions were discovered from records, and only brought out on cross-examination. Two or three additional accounts for professional services were not included in the inventory. The petitioner offered as an explanation that in August, 1897, his office was entered, and his case book, in which were his only memoranda of the accounts due him, together with $280 in gold that day borrowed from bank, were stolen, and that he had no mem-

oranda whatever of the debts due him, except a few bills which he had made out just before the book was stolen. He stated that the list of accounts attached to his petition was made up from memory. He was subjected to a vigorous cross-examination as to the fact of the indebtedness to his wife, and the manner of payment, which he stated was completed in November or December, 1895, and in 1896; the $235 mortgage above mentioned being the last payment. The evidence tended to show a value for his accounts receivable, scheduled, ranging from $80 to $350. *Mrs. Peterson* filed a *remittitur* of all of her judgment in excess of $700, whereby it is claimed the indebtedness was so reduced that petitioner was no longer insolvent. The court filed no findings of fact, but entered an order that the petition be not granted, and the proceeding be dismissed, and that *Mrs. Peterson*, the opposing creditor, have judgment for costs, from which order this appeal is taken by the petitioner.

Thomas Morris, for the appellant.

For the respondent there was a brief by *Winter, Esch & Winter*, and oral argument by *John J. Esch.*

DODGE, J. Ch. 179, with reference to the discharge of insolvent debtors, although it has occupied a place in the statutes since 1849 without very much change, and has existed substantially in New York from very early times, has received but little consideration or construction in this court. Sec. 4296 provides that when it shall satisfactorily appear to the court or judge that the insolvent is justly and truly indebted to the creditors in the sums mentioned in his schedule and affidavit, that such insolvent has honestly and fairly given a true account of his estate, and has in all things conformed to the matters required of him in this chapter, such court or judge shall direct an assignment of all the estate except such as is exempt from execution; and sec. 4299 provides that the court shall grant a discharge upon the filing of the

certificate of the assignee that the assignment has been executed and the assets turned over. It will be observed that the only conditions literally specified to be fulfilled are that it shall satisfactorily appear that the insolvent has (1) "honestly and fairly given a true account of his estate," and (2) "has in all things conformed to the matters required of him in this chapter." It is true the requirements of the chapter literally relate only to the procedure, namely, the filing of the petition and schedules, accompanied by a specified affidavit, and the giving of notice; but the purpose of the statute, obviously, cannot be satisfied unless the petitioner shows, not only that he had filed such necessary papers, but that the facts required to be stated therein exist. *German American Bank v. Butler-Mueller Co.* 87 Wis. 467. This is rendered all the more clear by sec. 4302, which authorizes a discharge, if granted, to be set aside if petitioner swore falsely in his affidavit annexed to his petition. That affidavit must state, *inter alia*, that petitioner has not at any time or in any manner disposed of or made over any part of his estate for the future benefit of himself or his family or in order to defraud any of his creditors, and that he has in no instance created or acknowledged a debt for a greater sum than he honestly owed.

The court below entered an order denying the petition, without making any finding of facts,—a practice not to be encouraged, as it leaves this court without information of the conclusion reached by the trial court as to the weight of evidence or credibility of witnesses on the issues of fact tried, if, as in this case, there be more than one. *Dietz v. Neenah*, 91 Wis. 422, 425. The rule is well established, however, that the decision will not be reversed for want of finding of facts, if the evidence supports it (*Disch v. Timm*, 101 Wis. 179), especially in a special proceeding (*Gill v. M. & L. W. R. Co.* 76 Wis. 293).

Remembering that the burden of proof is at all times

upon the petitioner who invokes the extraordinary relief authorized by ch. 179 (*In re Rankin*, 85 Wis. 15), and that the court is entitled to the utmost frankness and the fullest explanation before it can be satisfied of the material facts, especially if any suspicious circumstances appear, the evidence fails to satisfy us either that the petitioner has honestly and fairly given a true account of his estate, and has made a true inventory of all of his estate, and of books, vouchers, and securities relating thereto, or that he has not in any manner disposed of or made over any part of his estate for the future benefit of himself or family or in order to defraud his creditors. It appears from petitioner's own evidence that his business had been prosperous, so that, up to the year following the time when the claim for malpractice was made against him, he had not only supported his family and accumulated reasonable library and apparatus, but had built an expensive homestead costing some $4,800, and had paid over to his wife, according to his own statement, some $2,000, and that at the time of his petition, but a little more than a year thereafter, he had absolutely nothing, except a list of accounts worth, according to his own testimony, but $100 or $200. This story would be credible only if fully confirmed by other evidence than the petitioner's own testimony. When it is discredited by the fact that his bank account, theretofore kept, ceased almost at the moment of the rendition of a large verdict against him; that his book in which the charges were made for professional services, from which he had been able to save these considerable sums of money in the past, had disappeared, and its disappearance was accounted for only by his own statement of a theft,—improbable, because the book was of no possible use to any one else; that since about the time of the verdict no explanation whatever was given of the disposal of his professional income, no bank account being kept by him, while one was kept by his wife; accompanied by the

fact that according to his own story the inventory list of 125 debtors was made, after the alleged theft of his account book, from memory,— we are not satisfied of its truth. The petitioner's evidence fails to convince us that his alleged indebtedness to his wife is not an entire fabrication. It also fails to convince us that for the two years prior to the petition there had been no accumulations from his professional income, or that such accumulations have not been passed over to his wife for the future use of himself and his family. We are also wholly unconvinced that his case book, wherein were his charges for professional services, and his bank book, are not in existence and within his reach, had he seen fit to produce them. This fact, in itself, would be a breach of one of the requirements of the statute; but it also goes far to create a suspicion, if not a belief, of the existence of others. We hold, therefore, that the evidence would have supported findings of fact to have justified the decision rendered, which, therefore, should be sustained.

We deem it unnecessary to decide whether the omission of exempt property from the schedules is a breach of the statute, if made innocently and upon the supposition that such property is not required to be included. *In re Mabbett*, 73 Wis. 351; *Van Ingen v. Feldt*, 86 Wis. 345. It is certainly better practice to fully comply with the letter of the statute, and schedule "all the estate." That which is exempt can thereafter be determined by the court with much more certainty of justice to all parties than can be expected from an exercise of the insolvent's own judgment.

By the Court.— The order of the circuit court is affirmed.

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SCHAIDLER, Administratrix, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

March 15—April 4, 1899.

Railroads: Negligence causing death: Hypothetical questions: Incurable disease: Damages: Remarks of counsel: General and special verdict: Instructions to jury.

1. In an action against a railway company for the death of plaintiff's intestate, which occurred from *diabetes mellitus* thirteen days after a collision at a highway crossing, there was evidence that plaintiff suffered from said disease two years before his death; that it was a chronic disease and usually terminated fatally in from four months to six years, depending on age; but that plaintiff for a year and a half prior to the accident was apparently in a normal state of health. *Held*, that an hypothetical question designed to elicit from witnesses their opinions as to the cause of death, which recited the evidence with reference to the accident but omitted all reference to said disease, was misleading.
2. A railway company cannot escape liability for negligence causing death by showing that the person killed was so diseased that his life would necessarily have terminated in a short time in the absence of the accident, but such evidence should be taken into account in assessing the damages.
3. In such a case statements of plaintiff's counsel in his argument to the jury that "We can show you how many hundred men have come near being killed there, if you want us to;" that "You are called upon to set a price upon a human life;" that "Barriers are erected and watchmen placed at crossings on account of their danger, and in this case, unless the company can show they blew the whistle and rang the bell," it was liable; that "I know of a case in this town of a doctor who treated a little boy, who said the boy must die; but no sooner had he pronounced his death sentence than he got better, in defiance of the doctor's prognostication," are *held* erroneous, where not properly excluded from the consideration of the jury by the trial court.
4. The submission of a general verdict in connection with a special verdict, and the giving of a lengthy charge to the jury thereon, some portions of which were applicable to the special questions, is erroneous.

5. The giving of instructions to the jury applicable to questions submitted for special verdict, in detached fragments, distant from each other, disapproved.

APPEAL from a judgment of the circuit court for Monroe county: O. B. WYMAN, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Fish, Cary, Upham & Black*, and oral argument by *John T. Fish.*

For the respondent there was a brief by *D. F. Jones*, and oral argument by *Mr. Jones* and *Mr. F. H. Bloomingdale.*

CASSODAY, C. J. This action was brought to recover damages for the death of John F. Schaidler, husband of the plaintiff, resulting from injuries received by him, October 4, 1895, at a crossing of the defendant's railroad track with a certain highway leading from the village of Norwalk to Ridgeville, in Monroe county. Issue being joined and trial had, the jury at the close of the trial returned a special and also a general verdict to the effect (1) that the deceased was injured in his person at the highway crossing in question October 4, 1895; (2) that the whistle of the head locomotive was not blown at the whistling post eighty rods north of the crossing; (3) that the bell of the head locomotive was not rung eighty rods north of the highway crossing and from thence until the locomotive passed the crossing; (4) that such failure to ring the bell or blow the whistle was the proximate cause of the injury; (5) that the deceased was not guilty of any want of ordinary care on his part which proximately caused or contributed to such injury; (7) that such injury was an adequate and efficient cause of the death of the deceased; (8) that the deceased, prior to October 4, 1895, did have *diabetes mellitus*, (9) but had recovered from such disease October 4, 1895; (10) that the deceased died of *diabetes mellitus;* (11) that such disease was precipitated by the injury received by him at the time and place in question; (12) that he would have lived longer than he did if he had

not met with the accident in question; (13) that a man of ordinary intelligence and prudence, considering the business carried on by the defendant, ought to have reasonably expected, under all the attending circumstances, that the failure to blow the whistle or the failure to ring the bell would likely result in an injury to a traveler on the public highway at the crossing in question; (14) that the plaintiff, as such widow, has sustained pecuniary loss by reason of such death to the amount of $2,000; (15) that they found for the plaintiff. From the judgment entered upon such verdicts the defendant appeals.

On the day in question the deceased started from his home at Ridgeville, some distance northeasterly of the crossing in question, with a team and lumber wagon loaded with hogs in a rack. He passed over the crossing in question, and went in a southwesterly direction to Norwalk, which was about four miles from Ridgeville. After disposing of his hogs he started home by the same route. As he approached the crossing the highway ran along on the west side of the defendant's right of way, but at a very much lower grade. At a distance of 373 feet south of the crossing the highway was about seventeen feet lower than the crossing. From that point until it got within seventy-three feet of the crossing it gradually rose, until it was only eleven and eight-tenths feet below the crossing, and continued to rise until it got within twenty-two feet from the railway track, when the ascent became very abrupt. At eighteen feet from the crossing the railway track was seven and one-half feet higher than the surface of the highway. As the highway came near the crossing it gradually turned toward the east. Upon the northerly side of the highway, so approaching the crossing from the direction of Norwalk, there was a high embankment upon the westerly side of the defendant's right of way, with railroad ties piled on the top of it adjacent to the railroad track, obstructing the view, so that a person

approaching the crossing from that direction was unable to see a train coming from the north until within a few feet from the track. Such embankment came to within eighteen or twenty feet of the track. A person could not see a train approaching from the north at any considerable distance until he got so near the track that the embankment with the ties piled thereon would not obstruct his vision.

There is testimony tending to prove that when the deceased came to that little hill, going up to the crossing, he stopped a second, looked toward the crossing, and drove on again; that his team walked up, going to the crossing; that then, at the same time that the horses stepped on the crossing, the train came along; that the off horse tried to jump over, and got hit by the engine; that the deceased tried to jerk them back; that the collision threw the horses back, and broke up the wagon tongue and reach, and threw everything head over heels, and the whole lot fell on the top of the deceased; that the whistle was not blown before the train reached the crossing, nor the bell rung; that the train was running pretty fast; that it was downgrade; that the train was not using any steam.

Upon the record before us we do not feel authorized to say, as a matter of law, that the finding of the jury upon either the first, second, third, fourth, or fifth question submitted is unsupported by evidence.

1. Error is assigned because the physicians, as medical experts on the part of the plaintiff, were allowed to answer this hypothetical question: "Assuming that on the 4th day of October, 1895, the deceased was a young man, about twenty-six years of age; that he was a farmer by occupation, and for a year or more prior thereto had been in charge of a farm, working the same, and performing severe manual labor, such as farmers usually perform, during that time; that for a year and a half prior thereto he was apparently in a normal state of health; that on the day aforesaid he

loaded a load of hogs, and went with his team to Norwalk, a distance of three and a half miles or more, and transacted his business; that while returning home, sitting in a lumber wagon, he attempted to drive his team and wagon across the defendant's railroad crossing at a point mentioned in the complaint; that the defendant's locomotive and train rushed down upon him while his team was upon the crossing aforesaid, killing one horse and throwing the deceased to the ground with great violence, and hurling the wagon and rack upon him; that a few hours later he spat blood, and some time following this felt sick, suffered loss of strength, appetite, and sleep; that he was not thereafter able to perform his usual work, or perform labor of any kind as theretofore, and grew steadily weaker from day to day; that on or about the 16th day of October, 1895, he became bedridden, and about 2 o'clock of the same day lapsed into unconsciousness, accompanied by heavy breathing, and about twelve hours thereafter (1:30 o'clock, Thursday morning, on the 17th day of October, 1895,—thirteen days after the injury) he died, what, in your opinion, was the cause of death?"

The experts found difficulty in answering the question. One of them said: "The immediate cause of death would have to be found upon more exact knowledge as to his condition at the time;" that the exact cause of death he could not give, but, confining himself to the facts recited in the question, he would attribute his death to the accident. Another answered the same way, upon the assumption that the question embraced all the facts to be obtained. Another answered the same way, and also said that in his opinion the man died of disease produced or intensified by the accident; that the accident might not have caused the immediate disease of death; that he did not know what the disease was, and from the statement of facts given to him he could not with any certainty tell what that disease was.

No physician was called to attend the deceased until the

day before he died, and that physician was not sworn on behalf of the plaintiff. He was subsequently sworn, however, and testified (what is now conceded) that he was called to administer to the deceased October 15, 1893; that he then found him suffering from *diabetes mellitus* or what is called sugar diabetes, which he had then been suffering from for several months; that he continued to treat him at that time until November 20, 1893; that the nature of *diabetes mellitus* was to run a chronic course, and usually terminate in death; that the younger the patient the shorter it usually runs, and that it would run anywhere from four months to six years; that, assuming the deceased to have been twenty-four years of age when he attended him in 1893, his probable length of life would be about two years; that he considered diabetes, once established in a man twenty-four years of age, to be continuous; that when he was called to see him, the day before his death, he found him in a state of coma,— stupor,— and that he had *diabetes mellitus*. There is evidence tending to show, however, that for a year and a half prior to the accident the deceased was apparently in a normal state of health.

The principal difficulty with the question is that it entirely ignores the disease of *diabetes mellitus*, which he thus confessedly had two years before the accident, and of which the jury found that he died. Such conditions made the case one peculiarly calling for expert testimony. Expert testimony, in such cases, is necessarily limited to questions of science and skill. 1 Greenl. Ev. § 440; *Knoll v. State*, 55 Wis. 249. The opinion of such expert is his ultimate conclusion from facts which are admitted, proved, or assumed. To be of value, the opinion should be based upon all known and pertinent conditions. Even then the opinions of such experts frequently differ as to such ultimate conclusions. The question in the case at bar is incumbered with some unnecessary details, but by omitting all reference to the dis-

ease of *diabetes mellitus* it was, substantially, what was suggested by some of the plaintiff's experts, that is to say: Whereas the deceased was apparently well, and suffered the accident, and gradually grew weaker, and at the end of thirteen days died, what was the cause of his death? Of course, by excluding all reference to any disease, the accident is the only cause suggested in the question; and that could as well be answered by a layman as by a medical expert. The case is unlike *Tebo v. Augusta*, 90 Wis. 406, where actual conditions were assumed. So it is unlike *Selleck v. Janesville*, 100 Wis. 163, where the question embraced actual conditions and facts ascertained by the medical expert from personal examination. We are constrained to hold that the question was misleading.

2. Of course, highways are made to be traveled by all classes of people, including those who are sick and diseased as well as those who are strong and healthy. *McNamara v. Clintonville*, 62 Wis. 207, and cases there cited. A railway company can no more escape liability for negligently causing the death of one class than the other. The damage to the surviving relatives, however, would manifestly be very much less in the case of a person who, at the time of the injury, was so diseased that his life would necessarily terminate in a short time in the absence of such injury. In the case at bar, the motion to set aside the verdict was based in part upon the ground that the damages were excessive. Upon some phases of the evidence, this exception would seem to be well founded. The jury were probably stimulated to find the amount of damages mentioned by reason of objectionable remarks of counsel for the plaintiff, as follows: "We can show you how many hundred men have come near being killed there, if you want us to." "You are called upon to set a price upon a human life." "Barriers are erected and watchmen placed at crossings on account of their danger, and in this case, unless the company can show they blew the

whistle and rang the bell, the railroad company is liable." "I know of a case in this town of a doctor who treated a little boy, who said the boy must die; but no sooner had he pronounced his death sentence than he got better, in defiance of the doctor's prognostication." Some of such remarks were held to be improper by the trial court, but not in a way to exclude them from the consideration of the jury. *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 361, 362.

3. The submitting of a general verdict in connection with fourteen specific questions, with a lengthy charge to the jury thereon, and some portions of which are applicable to some of such specific questions, not only tended to mislead the jury, but is contrary to the recent ruling of this court. *Ward v. C., M. & St. P. R. Co., ante*, p. 215. The rules there stated should be followed.

The charge in the case at bar is open to the criticism that the charge upon each of several of the specific questions submitted is given in detached fragments,— distant from each other,— in violation of the recent ruling of this court in *McDermott v. Jackson, ante*, p. 419.

There may be other errors, but what has been said will, it is believed, be a sufficient guide upon the new trial.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

MASTERSON, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

March 15 — April 4, 1899.

Railroads: Wrongful ejection of passenger: Sunday contract: Excessive damages: Improper remarks of counsel.

1. In an action against a railway company under sec. 1818, R. S. 1878, for a tortious ejection from a train, the fact that the plaintiff claimed to be riding upon a ticket purchased on Sunday is immaterial.

2. An award of $850 damages for the wrongful ejection of a passenger from a railway train is *held* to be excessive, where he was ejected in the outskirts of a city, without any serious insult being offered by the conductor, and he did not claim to have been made sick or disabled, or to have suffered in any way, except that he was robbed of a small sum, without violence, while walking along the track.
3. Whether the robbery in such case could form any ground for the recovery of increased damages *seems* doubtful.
4. Unwarranted statements of plaintiff's counsel in his argument to the jury, to the effect that, by reason of its immense power as a railroad corporation, the defendant had prostituted justice and attempted subornation of perjury, are *held* to be so prejudicial as to warrant reversal of a judgment in plaintiff's favor, unless properly rebuked by the trial court.
5. Where counsel abuse their privilege in their argument to the jury, it is the duty of the trial court to interpose with vigor and stop it; and a mere statement that the remark is subject to criticism, or that it is rather a strong statement, is insufficient to correct the evil.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

This is an action for unlawful ejection from a railway train. The evidence showed that the plaintiff boarded the defendant's passenger train at the station of Trempealeau, Sunday evening, June 20, 1897, intending to ride to La Crosse. The plaintiff claims that he purchased a ticket at Trempealeau station, and that it was taken up by the conductor soon after he got upon the train, and that afterwards, and just before the train reached La Crosse, the conductor demanded his ticket again, and insisted that he had received no ticket from him, and, upon his refusal either to give the conductor another ticket or pay fare, the train was stopped about one mile from the La Crosse depot, in an uninhabited region, and the conductor put him off the train, at about half-past 10 in the evening, and he had to walk into the city. The defense was that the plaintiff had no ticket, and refused to pay his fare, and was put off from the train on that account, and that the place where he was put off was close to the in-

habited part of the city. A general verdict for the plaintiff, fixing the damages at $850, was rendered, and from judgment thereon the defendant appeals.

For the appellant there was a brief by *Fish, Cary, Upham & Black*, and oral argument by *John T. Fish.*

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *Geo. W. Bunge.*

WINSLOW, J. This is a tort action for wrongful ejection from the train at a place not a usual stopping place, nor near a dwelling house, contrary to the provisions of sec. 1818, R. S. 1878, as construed by the case of *Phettiplace v. N. P. R. Co.* 84 Wis. 412. Hence the fact that the plaintiff claimed to be riding upon a ticket purchased on Sunday is not important. The action is not for breach of a Sunday contract, but for tortious ejection from the train.

The damages awarded seem to us excessive. The conductor was evidently honest in his belief that the plaintiff had not paid his fare or surrendered a ticket, and it seems he was acting, as he believed, in discharge of his duty. The plaintiff was put off in the outskirts of the city of La Crosse, and does not claim to have been made sick or disabled, nor to have suffered in any way, except that he claims to have been robbed in a gentlemanly manner by two tramps while he was walking along the track. There does not seem to have been any serious insult offered to the plaintiff by the conductor at the time of his ejection. In fact, many of the passengers did not, apparently, know that anything unusual was happening. In the case of *Phettiplace v. N. P. R. Co., supra*, a verdict of $300 was said to be very liberal for an ejection fully as heinous as the one before us; and it was said that a less sum would have been more satisfactory. In *Boehm v. D., S. S. & A. R. Co.* 91 Wis. 592, the verdict was but $350, and the plaintiff in that case was compelled to walk a number of miles to get to his destination.

We should, perhaps, feel inclined to send the case back, with permission to the plaintiff to remit from the verdict, and enter judgment for a specified sum, were it not for some other matters in the record, now to be stated. It seems that an effort to settle the plaintiff's claim was made by the defendant's claim agent after the matter had been placed in the hands of attorneys, and without their presence. It appears, also, that the defendant claimed on the trial that the plaintiff's attorneys were prosecuting the action under a champertous agreement. These two charges seem to have been bandied back and forth by the attorneys until considerable ill feeling was aroused; and the plaintiff's attorneys upon the closing argument certainly went far outside of the record, and indulged in inflammatory language calculated to stir the prejudices of a jury, without cause. Thus, one of the plaintiff's attorneys said, in substance, that railroad corporations, by means of the immense force at their nod and beck, are able to accomplish the prostitution of justice; that in this case "you [the jury] have witnessed a proceeding which, in my judgment, is a prostitution of the usual and ordinary proceedings in a court of justice;" that there had been attempts on the part of the defendant which point strongly to subornation of perjury; that "reputation is cheap, weighed against the money of this company,— counsel does not consider it as that" (snapping thumb and finger); and more in the same strain. Careful examination of the case does not disclose any excuse for such statements and insinuations. The case seems to be one honestly defended by honorable counsel, and no good reason appears for such attempts to import into it mere abuse and appeal to prejudices, which are always easily aroused. Nor were these remarks rebuked with any degree of vigor by the circuit court. Again we say, as was said in *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157, "A case that cannot be fairly won upon the evidence, by the use of legal and lawyer-like meth-

ods, presumably does not deserve to be won at all." And we say, in addition, that it is the duty of the trial judge to interpose with some vigor when counsel so abuse their privilege, and stop it. The mere statement by the judge that a remark is subject to criticism, or that it is rather a strong statement, is entirely insufficient to correct the evil.

The plaintiff proved, without objection, that after his ejection from the train, and while walking along the track, he was met by two tramps, who relieved him of $12.50 in money, without violence. It seems doubtful whether such an event could form any ground for the recovery of any increased damages, and it is argued that the testimony was immaterial; but as there was no objection or exception to the testimony, and the charge of the court is not preserved, the question is not before us, and we cannot rule upon it.

By the Court.—Judgment reversed, and action remanded for a new trial.

JOHNSON, Respondent, vs. BRICE and others, Appellants.

March 16—April 4, 1899.

Register of deeds: Failure to make entry in tract index: Liability.

If a register of deeds, required by law to keep a tract index, neglect his duty as to a mortgage on a particular parcel of land, which parcel another subsequently purchases, not knowing of such mortgage by reason of relying on such index, on discovering the facts and failing by reasonable efforts to secure a release of the mortgage from the owner thereof, such other may purchase such mortgage, and, having exhausted his remedy to obtain reimbursement for his expenditures in that regard against his covenantee if there be such, and against the mortgagor as well, may hold the register of deeds and the sureties on his official bond for the residue of such expenditures and interest thereon.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

On the 28th day of July, 1888, and for some time thereafter, *George W. Brice* was the register of deeds for La Crosse county, Wisconsin, and his codefendants were the sureties on his official bond. On the day named James B. Canterbury, then the owner of lot 13, block 2, of Spier & Canterbury's addition to the city of La Crosse, mortgaged the same, together with ten other lots, to one Schaller to secure the payment of a note of $1,500, the mortgage being on or about its date filed for record with said register of deeds and by him duly recorded and indexed according to law, except that he did not note the incumbrance on the lot on the tract index which was kept in his office according to the statutes of this state requiring the same. November 26, 1888, Anna U. Stephenson purchased the aforesaid lot 13 and took a conveyance thereof, and March 19, 1892, plaintiff, after satisfying himself, by a duly certified abstract made from the tract index by his procurement, that said lot was owned by Stephenson free from incumbrances, and relying on such abstract for information in that regard, purchased and took a conveyance of such lot from said Stephenson. March, 1894, by a notice from Schaller, plaintiff learned of the mortgage, on which there was then due $800, and thereafter, in order to prevent a loss of his investment in the lot, and after unsuccessful efforts to obtain a release of such lot from the mortgage, he purchased such mortgage and the indebtedness secured thereby, paying $802 therefor. At the time of such purchase the mortgage covered three lots in addition to the one in question. After plaintiff acquired the mortgage he duly foreclosed it, realizing all that could be obtained in the foreclosure proceedings for the three lots, and leaving a deficiency of $1,002.84, for which judgment was rendered against Canterbury, the person liable therefor. Thereafter plaintiff commenced an action against Anna

U. Stephenson, his grantor, on the covenants of warranty in her deed to him, and prosecuted the same to a judgment for $946. Both Canterbury and Stephenson being insolvent, plaintiff tendered both of the aforesaid judgments to defendants and demanded compensation of them for his loss growing out of the fault of *Brice* in neglecting to note the Schaller mortgage on the tract index. The demand was refused, and this action was thereupon brought to recover for the aforesaid loss, the facts as stated being alleged as constituting a cause of action in favor of plaintiff against the alleged negligent register and his sureties.

The answer, among other things, alleged possession of lot 13 by Anna U. Stephenson when the Schaller mortgage was executed, and while that situation continued a release by Schaller of ten lots from the mortgage, which were of greater value than the whole amount of the mortgage claim, and further alleging that plaintiff unnecessarily purchased the incumbrance on his property. The defendants further pleaded the six-year statute of limitations.

The jury were required to render a special verdict, which was done, in which facts were found substantially as alleged in the complaint, among the facts being the following: The records in the office of the register of deeds were examined in plaintiff's behalf before he purchased the property, but he relied upon the abstract made by the then register of deeds from the tract index, as showing the true condition of the title. Anna U. Stephenson was not in possession of the lot at the time of the making of the Schaller mortgage, and Schaller did not know but that the lot was vacant, till 1894. Plaintiff endeavored to procure a release of the lot from the mortgage before purchasing such mortgage. The three lots covered by the mortgage, other than plaintiff's lot, were worth $450 when plaintiff purchased the mortgage, but only $135 when they were sold at the foreclosure sale. The omission of the register, *Brice*, to properly note the

mortgage upon the tract index caused plaintiff to purchase lot 13 in ignorance of the existence of such mortgage. Plaintiff was damaged, by reason of the failure of *Brice* to note the Schaller mortgage on the tract index, in the sum of $800, with interest thereon at the rate of six per cent. per annum from the 15th day of October, 1894. All the facts were found, or admitted, requisite to fix upon defendant *Brice* the legal duty to have properly kept the tract index.

Judgment was rendered upon the verdict in favor of the plaintiff for the sum of $972 and costs, from which this appeal was taken on exceptions sufficient to predicate the assignments of error upon, mentioned in the opinion.

C. L. Hood, for the appellants.

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *Geo. W. Bunge*.

MARSHALL, J. A number of questions are discussed in appellants' brief, not of controlling importance in disposing of the appeal, therefore they will be passed without special mention. The facts are found by the jury on sufficient evidence to present for consideration this question: Where it is the official duty of the register of deeds to keep a tract index and he fails to perform that duty in respect to a mortgage upon a particular parcel of land, and thereafter a person relying upon such index as correct purchases such parcel believing it to be free from incumbrances, and subsequently, on discovering the existence of such mortgage, he makes unsuccessful efforts to secure a release of his property from it, and failing in that regard purchases the mortgage in order to clear his title of the incumbrance and protect himself so far as practicable against loss, and thereafter he reimburses himself for his expenditures in buying up the mortgage so far as practicable by enforcing the same as to all property covered by it other than his own, and then exhausts his remedy against his vendor and the party personally liable

for the mortgage debt as well, can he hold the defaulting register and the sureties upon his official bond for the balance of his loss if his action to do so be not commenced till more than six years after the default of the register as to the tract index? That presents what is involved in this case in a narrow compass so that it can be easily understood.

It is conceded that it was the duty of the register to keep the tract index and that he did not perform that duty as to the mortgage in question. Sec. 762, R. S. 1878, covers the subject of duty. The conditions of the register's official bond bound him and his sureties for the correct and impartial performance of his duties. Sec. 755, R. S. 1878, covers that subject. Any person injured by neglect of the register constituting a breach of his bond has a right of action on such bond in his own name to recover his damages caused by such neglect. Sec. 985, R. S. 1878, covers that subject. The statutes referred to, on the facts of this case, fix beyond reasonable controversy the liability of defendants for the damages to plaintiff caused by the neglect of the register, and entitle him to the judgment appealed from if the action was brought in time and the proper measure of damages was adopted in reaching it. Plaintiff had a right to rely on the tract index. While there is evidence that some examination in his behalf was made of the indexes other than the tract index, the jury found that the defect in the latter was the cause of plaintiff's failure to discover the existence of the mortgage before he purchased the lot. It follows that whatever legal damage resulted to him from the mortgage goes back to the neglect of the register to properly perform his official duty, and is chargeable to him and his sureties, unless the claim is barred by the statute of limitations, as before stated.

But it is said that notwithstanding Schaller, the holder of the mortgage, refused to release plaintiff's lot therefrom, he had no right to purchase such mortgage or incur expense,

to the defendants' loss, till compelled to do so by an enforcement of the mortgage by Schaller, "because," says the learned counsel, a person circumstanced as plaintiff was "is not obliged to redeem from the mortgage and cannot recover compensation for an uncertain injury," citing authorities to the effect that only actual damages are recoverable for breach of a covenant against incumbrances, and that a person who is liable to suffer from such a breach is not obliged to buy up the incumbrance, but may wait till eviction has taken place and then sue for the consideration paid for the property, with interest. Such authorities have no application here, because, in the same connection, it is ruled that a person so circumstanced may free his property from the incumbrance if he sees fit to take that course, and then hold the covenantor liable for the actual damages caused by it. The universal rule, as stated in Rawle, Covenants (2d ed.), 158, is that, "If the character of the incumbrance be such as to admit of removal, the plaintiff is entitled to recover the amount which he has fairly and reasonably paid for its extinguishment." *Eaton v. Lyman*, 30 Wis. 41, cited by appellants' counsel to support his proposition, states both rules referred to together, to the effect that while a covenantee is not bound to discharge the incumbrance before bringing suit for a breach of it, unless he suffers actual damages by effecting such a discharge before suit he can recover only nominal damages. For further authorities on the subject, see Rawle, Covenants (5th ed.), § 188; *Coburn v. Litchfield*, 132 Mass. 449; *Braman v. Bingham*, 26 N. Y. 483; 3 Washb. Real Prop. (5th ed.), 529; 2 Suth. Dam. (2d ed.), § 623; *Pillsbury v. Mitchell*, 5 Wis. 17; *Noonan v. Ilsley*, 21 Wis. 138. The law on this subject is so well settled that it would look too much like treating the question as one for serious consideration to pursue it further. It is the undoubted right of the owner of real estate upon which there is an incumbrance, which another is legally bound to him to discharge,

but has failed to do so, to extinguish it, expending no more for that purpose than is reasonably necessary, relying on such other for reimbursement; and when that is done the amount of the expenditure, with interest, will be the true measure of such person's damages and such other's liability.

It is not necessary to say here whether it was requisite under the circumstances of this case for plaintiff to have exhausted his remedy against his covenantor and on the note and mortgage as to property other than his own covered by it as well, before pursuing the register and his bondsmen. The rule is that way in many jurisdictions, and certainly he was permitted to do so, and defendants have no reason to complain on that score so long as they are unable to make any showing but that plaintiff proceeded with diligence and care. Undoubtedly, in such cases, the expenditures should be carefully scrutinized, and no more included in the recovery than was reasonably necessary.

The foregoing rule as to the measure of damages for breach of covenant against incumbrances applies in regard to indemnity for loss to a person caused, without fault on his part, by neglect of a register of deeds in respect to his official duties. Throop, Pub. Off. § 743; *Wacek v. Frink*, 51 Minn. 282; *Lusk v. Carlin*, 5 Ill. 395; *Chase v. Heaney*, 70 Ill. 268; *Ziegler v. Comm.* 12 Pa. St. 227.

There is left for consideration the effect of the statute of limitations pleaded. It does not definitely appear by the answer what particular statute is relied upon, but appellants' counsel suggests in his brief subd. 3, 4, sec. 4222, R. S. 1878. The learned counsel failed to give proper significance to the fact that this action is on a sealed instrument. Sec. 4220 covers such actions, except those mentioned in secs. 984, 3968, and 4222, none of which refer to an instrument like the one in suit. Sec. 984 covers actions by public corporations upon official bonds; sec. 3968 refers to actions on guardians' bonds; and sec. 4222, so far as it applies to sealed instruments, re-

fers to actions on public obligations in writing for the payment of money. So the twenty-year statute, not the six-year statute of limitations, governs, beyond room for reasonable controversy, and this action was brought in time.

The other questions suggested in the argument of the learned counsel for appellants have received such consideration as their importance requires. The reason why they have not been specially treated is that they do not appear to be of sufficient significance to affect the result.

By the Court.—The judgment of the circuit court is affirmed.

GERMAN AMERICAN BANK, Appellant, vs. MAGILL and another, Respondents.

March 16—April 4, 1899.

Partnership: Firm debt: Chattel mortgages: Fraud: Insolvency.

1. A member of a going partnership who was under no obligation to contribute further to the capital of the firm received money as guardian and it was used in carrying on the firm business, all the partners consenting. *Held*, that liability to return the money to the wards became a partnership debt as fully and absolutely as though the money had been borrowed from a third party.
2. Where chattel mortgagees had no knowledge that the mortgagor was insolvent at the time the mortgage was given, and parted with their money relying on the strength of the security, it cannot be set aside in garnishment proceedings instituted by other creditors, unless it is shown that the mortgagors had a design to defraud their creditors and that the mortgagees participated therein.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Affirmed.*

Proceeding by garnishment. The firm of Scherrer, Teiml & Co., wholesale liquor dealers, was organized in 1893. Teiml died in 1897, and thereafter business was conducted

under the old firm name. All the capital was furnished by J. M. Scherrer. In 1896 he was appointed guardian of certain minor children, and as such received $2,000 insurance money belonging to his wards. This money was used in the firm's business. In April, 1898, he resigned, and there was found due his wards about $1,700. On April 28, 1898, the firm executed a note and chattel mortgage to the garnishee *Salome Teiml* for $1,855. The mortgage covered their entire stock and fixtures. The money was borrowed to pay the amount due from Scherrer as guardian. On the same day they also sold their book accounts to *Mrs. Teiml* for $1,000. *Mrs. Teiml* borrowed that sum from the garnishee *H. P. Magill*, who took an assignment of the chattel mortgage of the firm as collateral security for the loan. Immediately after the execution of the chattel mortgage *Mrs. Teiml's* agent took possession of the mortgaged property, and was in possession when the garnishee summons was served. Both garnishees answered, setting up the chattel mortgage and claiming to hold the property thereunder. Notice of election to take issue upon such answers was duly served, and the case was tried by the court. The court found the allegations of the answers to be true, and entered judgment in favor of the garnishees, from which this appeal is taken.

For the appellant there was a brief by *McConnell & Schweizer*, and oral argument by *C. H. Schweizer*.

Ray S. Reid, for the respondents.

BARDEEN, J. The main point made by the appellant against the validity of the trial court's judgment is that the chattel mortgage given by the defendants is void, because the firm was insolvent and the mortgage was given to pay the debt of an individual member of the firm. On the question of fact of whether the debt for which the mortgage was given was a firm debt or not, there is little room for controversy. On the very day the first money was received by J. M. Scherrer in his capacity as guardian, $400 of the amount

was used by his partner to pay a firm indebtedness. The remainder was deposited in the bank, and checked out from time to time by the firm as their necessities required, mostly by the defendant William Scherrer. The manner in which they kept their accounts cannot have a controlling influence over the actual facts. At the time the money was received by J. M. Scherrer, the firm was a going concern. Its business was established, and had been for some years. They were in apparent need of funds. They took this money and used it in their business, both partners consenting. In law it thereby became a firm debt. The facts are quite different from some of the cases in the books. This was not the case of one partner using trust funds to pay an obligation he owed the firm. J. M. Scherrer was under no obligation to contribute any more capital for the firm's use. So, when the firm took and used this money, it became as fully and absolutely a firm debt as though it had been borrowed from a third party. Both parties treated it as such, and, in the absence of any circumstances showing that the mortgage was given with intent to defraud creditors, it cannot be impeached in this proceeding.

While it may be admitted that the proof shows that the firm was insolvent at the time the mortgage was given, there is no proof that either of the garnishees had any knowledge of that fact. So far as we are able to judge, *Mrs. Teiml* took the mortgage in absolute good faith, and parted with her money relying upon the validity of the security she received. Such being the case, unless it be shown that the defendants had a design to defraud their creditors and that the garnishees participated in such fraudulent purpose, the transaction cannot be avoided in this kind of a proceeding. *Bleiler v. Moore*, 94 Wis. 385. There is no claim that any such vicious design existed, and hence the ruling of the trial court was right.

By the Court.— The judgment of the circuit court is affirmed.

SHEARER and another, Respondents, vs. BROWNE and wife, imp., Appellants.

March 16 — April 4, 1899.

Surviving partner: Title to assets: Administrator's sale: Mechanics' liens: Assignment.

1. Where the materials for which a lien is claimed were furnished by one who, as surviving partner, was carrying on the business formerly conducted by a firm, the debt is due to him individually, and he may assign the claim as if there had never been any partnership.
2. No interest in such debt or right to a lien is conveyed by an administrator's sale of the interest of the deceased partner in the firm, but merely a right to share in the net proceeds of the assets of the business when it is closed up.
3. A right to a mechanic's lien can be assigned only under the limitations and conditions prescribed in sec. 3316, Stats. 1898, and is waived by an assignment not complying with that section.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

The plaintiffs sue to foreclose a subcontractor's lien upon premises of the defendant *Browne* for material claimed to have been furnished the principal contractor, Rasmussen, under the following circumstances: Prior to August 6, 1894, the plaintiff *Shearer* and one George Fox were copartners in the lumber business, under the name of Shearer & Fox. On that date Fox died, and *Shearer* continued to conduct the business, using the firm name therefor. Shortly afterwards he was appointed administrator of the estate of Fox. The material in question was furnished between November 3, 1894, and January 9, 1895. A notice of subcontractor's lien was given in February, and on July 5th claim for lien was filed. On August 5, 1895, *Shearer*, as administrator, sold the interest of Fox in the partnership business and assets at auction to the widow, Grace Fox, who immedi-

ately thereupon transferred to the plaintiff *John F. Jardine* the interest so purchased by her, and thereupon a new firm was organized, consisting of the plaintiffs, to which each contributed as capital his interest in the said assets, both chattels and choses in action, of the old firm. All of these transfers and transactions were verbal merely. Suit was commenced September 21, 1895.

For the appellants there was a brief by *E. L. & E. E. Browne*, and oral argument by *E. E. Browne.*

For the respondents there was a brief by *Lord & Wheeler*, and oral argument by *F. F. Wheeler.*

DODGE, J. Numerous questions affecting the rights of the parties, either in whole or in part, were urged, to a consideration of some of which numerous other facts would have been material. But the view we take of one of these questions seems to render discussion of the others unnecessary.

It is a fact uncontroverted that, at the time the materials constituting the basis of the lien claim here made were furnished, plaintiff *Shearer* was running the business as surviving partner. That being the case, the title to the property was in him, and the debt for the material furnished was due to him, as absolutely and individually as if there had never been any partnership. *Roys v. Vilas*, 18 Wis. 169; *Lawrence v. Vilas*, 20 Wis. 381, 391; *Sherman v. Kreul*, 42 Wis. 33; *Martin v. Morris*, 62 Wis. 418, 427; 17 Am. & Eng. Ency. of Law (1st ed.), 1154, 1173, *et seq.* The only difference resulting from the fact of his being a surviving partner was that he owed a duty, after disposing of all assets and paying all debts, to account to the estate of his deceased partner for the proper share of the net proceeds. But this gave, neither to him as administrator nor to those beneficially interested in that estate, any interest whatever in either the stock of lumber or choses in action. This being

the situation, the conveyance of this demand against Rasmussen to a partnership consisting of himself and *Jardine* was an assignment of such demand, legal and effective. Whereas, prior to that time it was a debt due *Shearer*, upon which he alone could have sued either at law for a money judgment or to enforce a lien, by the assignment it became the joint asset of the partnership, upon which suit must be brought by both. We must not be understood as holding that the sale by *Shearer*, as administrator, of the interest of his deceased partner in the firm, was an assignment of this account. That was a transfer of a mere equity to a share in the net proceeds of all the assets of that business, and conveyed no interest in this particular chose in action. *Rommerdahl v. Jackson*, *ante*, p. 444. Such transaction is entirely distinguishable from that by which the title to this specific asset, amongst others, was transferred from *Shearer* to the new firm of Shearer & Jardine as joint owners.

At an early day this court, in *Caldwell v. Lawrence*, 10 Wis. 331, adopted the view that a right to a mechanic's lien was so distinctly a personal and individual privilege that it was waived and destroyed by an assignment. The position taken in that case has never been departed from. It was reiterated and enforced in *Tewksbury v. Bronson*, 48 Wis. 581, and referred to as still maintained in *Bernhardt v. Rice*, 98 Wis. 578. Inasmuch as the rule so laid down in 1860, with only the modifications accomplished by statute, has been through so many years recognized as the law of this state, it should now be held settled, and there is no occasion to consider the extremely variant views maintained by other courts. Starting, then, with the principle, laid down in *Caldwell v. Lawrence*, that at common law no assignment of a right to mechanic's lien could be made, and that an assignment of the claim destroyed that right to lien, as ruled in *Tewksbury v. Bronson*, the statute (Stats. 1898, sec. 3316), with the limitations and conditions therein con-

tained, grants and must measure all assignability which exists. Among those limitations we find the requirement that the assignment must be in writing, and notice thereof must be given to the owner of the property within fifteen days thereafter, neither of which was complied with in this case. We are therefore constrained to hold that the right to a mechanic's lien has been waived by assignment, and that no judgment of foreclosure should have been rendered against the appellants.

By the Court.— Judgment reversed, and cause remanded for a new trial.

SIPES, Respondent, vs. DECKER, imp., Appellant.

March 16 — April 4, 1899.

Equity: Parol agreement to convey land: Fraud.

1. Before a court of equity will enforce an alleged parol agreement to convey land there must be shown a specific agreement to convey, based upon a good consideration. A mere intention, even though repeatedly asserted and partly executed, is not enough.
2. In an action to foreclose a mortgage given by T. on lands purchased by him from plaintiff's husband, since deceased, a daughter of the grantor answered by way of counterclaim that while residing in Kansas she had been induced by her father to move to Wisconsin and reside with him by promises that if she would do so she should have the lands in question; that her father had then given her the lands upon the condition that she should give him one third of the crops raised thereon during his lifetime; that she had accepted the gift and entered into possession of the premises, to the knowledge of the plaintiff, and was still in possession thereof; that while ill her father had caused a deed of said lands to her to be prepared, but was induced by the fraud and undue influence of the plaintiff not to execute it; and that while feeble in mind and body he had been induced, by like fraud and undue influence, to convey the lands to T. and take back the note and mortgage in plaintiff's name for a part of the purchase money. *Held*, that no legal or equitable right of the daughter in the lands was shown which would warrant the interposition of a court of equity.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Lord & Wheeler*, and oral argument by *F. F. Wheeler.*

For the respondent there was a brief by *Goodrick & Goodrick* and *Connell & Hart*, and oral argument by *E. J. Goodrick.*

CASSODAY, C. J. This is an action to foreclose two notes and a mortgage upon real estate for the aggregate amount of $1,788, executed July 19, 1894, by the defendants Ernestine and Warren C. Topping to the plaintiff, and recorded July 20, 1894. The complaint is in the usual form, and the other defendants are joined as subsequent claimants. The mortgagors made no answer, but the defendant *Elvina Decker* separately answered and admitted nearly all the allegations of the complaint, except that she denies that her interest in the mortgaged premises is subsequent to the lien of the mortgage; and for an equitable counterclaim she therein alleges, in effect, that December 20, 1851, John Sipes, who was the husband of the plaintiff at the time of the execution of the notes and mortgage, married one Louisa M. Watson; that one George G. Sipes and the defendant *Elvina* were the lawful issue of such marriage; that John Sipes and Louisa lived and cohabited together from the time of their marriage until 1867, when Louisa, mother of George and *Elvina*, obtained a divorce, which was duly rendered December 9, 1867; that July 31, 1877, John Sipes married the plaintiff, who was at that time a widow and had two children; that John at that time owned the mortgaged premises described; that from 1885 to 1892 *Elvina* resided in Kansas; that her father visited her, and urged her to come to Waupaca county, and said that if she would she should have the lands in question; that he wrote her, urging her to come and reside upon such lands, and stated that her husband could carry on the meat

business; that in pursuance of such statements and solicitations she complied with such request, and abandoned her home in Kansas, and came to Waupaca county November 27, 1892, when her father gave to her all of the lands described, upon the condition that she would give him one third of the crops raised thereon during his lifetime; that *Elvina* accepted such gift, and entered into the actual and peaceable possession thereof, and continued in such possession thereafter, and that the same was with the knowledge of the plaintiff; that November 27, 1893, her father was taken ill, and remained feeble and in poor health, off and on, from that time until his death; that March 22, 1894, her father caused a deed of the lands from himself and his wife to her to be made out, but he was induced, by and through the cunning, artifice, deceit, and undue influence of the plaintiff, not to execute and deliver the same; that July 19, 1894, her father, while feeble in mind and body, and in fraud of her rights, and by cunning, artifice, deceit, fraud, and overpersuasion of the plaintiff, conveyed the land by warranty deed to the defendant Ernestine Topping in consideration of $2,200, and took back the notes and mortgage in the name of the plaintiff in part payment of the purchase price therefor, and that the same was done without the knowledge or consent of *Elvina;* that at the same time the plaintiff also procured the balance of the purchase price of the land, $412, for herself; that April 5, 1895, her father died, at the age of seventy-three; that her father had owned other real estate, of the value of $2,000, which he had conveyed to the plaintiff; that she had been informed and believed that during the time her father was ill, and up to the time of his death, the plaintiff said to him that *Elvina* had robbed him once and would again, that she had never done anything for him, and never would, and that she went off and left him with only a bed and a couple of quilts; that such several statements, if made, were false and untrue, and that she

loved and respected her father, and had done all she could to assist and comfort him.

The answer prayed judgment that the plaintiff take nothing by her action; that the real estate be adjudged to be the property of *Elvina*, or, if beyond the reach of the court, then that the notes and mortgage be surrendered up and turned over to the estate of John Sipes. The plaintiff replied to the equitable counterclaim by way of admissions and denials.

After the plaintiff had proved her case and rested, and a witness had been sworn on behalf of the defendant *Elvina*, the plaintiff objected to any evidence under the counterclaim, and the court sustained the objection on the ground that it did not state facts sufficient to constitute an equitable counterclaim. Thereupon, and upon appropriate findings of fact and conclusions of law establishing the plaintiff's claim as alleged in the complaint, judgment of foreclosure and sale was entered, and from that judgment the defendant *Elvina Decker* appeals.

The mortgagors held a warranty deed of the mortgaged premises, executed by the plaintiff and her husband. Their title to the land, subject to the mortgage, was not and could not be successfully questioned, upon the pleadings in this action. True, the appellant alleges that she was in possession when the deed was delivered and the mortgage given back, under a parol agreement to work the land on shares and give her father one third of the crops raised thereon; but her father had died several months prior to the commencement of the action, and hence such alleged parol agreement had terminated. There is nothing in the answer, if proved, which would justify a court in finding that the appellant's father had not fully performed all the promises he had made in respect to giving her the lands. The mere fact that he had stated to her and others that he intended to give her the lands, or that the lands should be hers when he got through

with the same, or that he caused a deed of the lands to be drawn, but which the plaintiff, through cunning, artifice, deceit, and undue influence induced him never to execute or deliver, is no ground for taking the notes and mortgage from the plaintiff and giving them to the appellant or to the estate of John Sipes.

The theory of the appellant seems to be that the plaintiff took the notes and mortgage subject to a parol agreement of her husband to convey the lands to the appellant, and that the trial court, as a court of equity, should have enforced such parol agreement. But before a court of equity can thus decree there must be a specific agreement to convey, based upon a good consideration. The counterclaim fails to disclose such an agreement. A mere intention, repeatedly asserted and partially executed, is not enough. The appellant's father owned the land. He had the legal right to dispose of it as he saw fit, subject to his wife's dower and homestead rights. The counterclaim alleges no legal or equitable right in the appellant to the lands which would justify the court in setting aside the transaction. Counsel for the plaintiff refers to the statutes of frauds and decisions under them. Stats. 1898, secs. 2302, 2304, 2305. But it is unnecessary to resort to those statutes, or such decisions, in order to defeat the contentions of the appellant. The trial court was clearly right.

By the Court.—The judgment of the circuit court is affirmed.

THORNE, Respondent, vs. ÆTNA INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant.

March 16 — April 4, 1899.

Chattel mortgages: Conditional delivery: Parol evidence: Fire insurance.

1. Parol evidence is admissible to show that a written contract, not under seal, of which there has been manual tradition, was not to become binding until the happening of some event or ascertainment of some fact, but not that the contract was to be presently binding and to become void on the happening of some event.
2. In an action on an insurance policy which the insurer claimed had been rendered void by the giving of a chattel mortgage on the property insured, the mortgagee's attorney testified that he asked the insured for a mortgage until he received notice of the entry of a judgment against her; and the insured testified that the attorney "asked if I was willing to have this mortgage executed for a few days, until the judgment was entered, when it should be null and void, and I told him I was." The mortgage was at once filed, but the note which it secured was never returned, although it was ascertained after a day or two that the judgment had been entered before the mortgage was given. *Held*, that the evidence would not sustain a finding that the mortgage was not to go into effect if the judgment had already been entered.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

This is an action upon a fire insurance policy of $1,000 upon the plaintiff's stock of millinery, situated at Clintonville, Waupaca county, Wisconsin, which was partially destroyed by fire March 21, 1895. The defense was that a chattel mortgage upon the property was executed November 23, 1894, during the life of the policy, and in violation of one of the provisions of the policy, by which the policy was avoided if the property insured was chattel-mortgaged. In addition to this defense, it was claimed by the defendant that the plaintiff's damage did not exceed two or three hundred dollars.

On the trial it appeared that the policy was issued June 21, 1894; that in November, 1894, the plaintiff was indebted to J. E. Jenner & Co. to an amount of more than $500; and that the claim was put in the hands of Mr. Guernsey, an attorney at Clintonville, who commenced suit upon the claim November 1, 1894. No defense was put in, and on the 21st or 22d of November Guernsey made affidavit of no answer, and mailed all the papers to the clerk of the court, at Waupaca, the county seat, some fifty or sixty miles distant, for the entry of judgment by default. On the 23d of November, 1894, *Mrs. Thorne* gave a note and mortgage upon the stock in question, payable to Jenner & Co., for the amount of their claim; but it was claimed that this mortgage was given under an agreement that, if judgment had already been entered by the clerk prior to the execution of the mortgage, the mortgage should be of no effect.

A special verdict was rendered in the case as follows: "(1) Did the plaintiff on the 23d day of November, 1894, execute written instruments, purporting on their face to be a note and chattel mortgage to J. E. Jenner & Co., for the sum of $561.95; said mortgage, on its face, purporting to incumber her stock of millinery goods mentioned and described in the policy of insurance issued by the defendant to the plaintiff, upon which this action was commenced? *A.* (By the court.) Yes. (2) Were the said note and chattel mortgage executed and delivered to F. M. Guernsey, agent of J. E. Jenner & Co., upon an agreement with the plaintiff (*Mrs. Thorne*) that such note and mortgage should be void and of no effect in case judgment had been previously entered in the action of J. E. Jenner & Co. against her (*Mrs. Thorne*)? *A.* Yes. (3) Did the plaintiff deliver the said note and mortgage to the said agent, Guernsey, for the purpose of creating a lien upon her said stock of goods, without reference to the time when said judgment should be docketed? *A.* No. (4) Was the plaintiff, at the time she exe-

cuted the note and mortgage, indebted to J. E. Jenner & Co., for goods sold her, with interest and costs, in the sum of $561.95, or thereabouts? *A.* (By the court.) Yes. (5) Was the plaintiff at the time of the fire indebted to the firm of J. E. Jenner & Co. in an amount of $460, or thereabouts? *A.* (By the court.) Yes. (6) Did the defendant, the *Aetna Insurance Company of Hartford, Connecticut*, or any of its agents or officers, have knowledge that the property insured had been incumbered by said chattel mortgage, until after the fire and loss? *A.* (By the court.) No. (7) Did F. M. Guernsey, agent, know at the time the chattel mortgage was made and executed by the plaintiff, *Mrs. Thorne*, that judgment had been entered against *Mrs. Thorne* by the clerk of the Waupaca county circuit court? *A.* (By the court.) No. (8) Was any consent or agreement indorsed in writing upon, or attached to, the policy of insurance, that the property insured could be incumbered by a chattel mortgage? *A.* (By the court.) No. (9) Did the agent of defendant company, R. G. Gibson, on the 27th day of June, 1895, tender to the plaintiff the sum of $24.27, or unearned premium on said policy of insurance? *A.* (By the court.) Yes. (10) What was the amount of loss and damage on plaintiff's property, covered by said policy of insurance, by the fire of March 21, 1895? *A.* $250."

The court struck out the answer to the tenth question, $250, and inserted $1,000 in lieu thereof, and entered judgment for the plaintiff upon the verdict as so amended; and the defendant appeals.

For the appellant there was a brief by *Hume, Oellerich & Jackson*, and oral argument by *John W. Hume.*

For the respondent there was a brief by *Goodrick & Goodrick* and *F. M. Guernsey*, and oral argument by *E. J. Goodrick.*

WINSLOW, J. If a valid chattel mortgage had been executed by the plaintiff on her stock of goods during the life

of the policy, then the policy was avoided, by its terms, and she could not recover. So the question presented was simply whether the mortgage, which was in form executed to Jenner & Co., and delivered to Guernsey, was in fact an effective mortgage. If it was effective, even for a few days, it would avoid the policy.

The plaintiff endeavored to avoid the forfeiture by claiming that though the mortgage was signed, delivered, and placed on file, still this was all done under an agreement that it should only be effective in case judgment upon the Jenner claim had not been entered by the clerk of the court at Waupaca, and should not be effective for any purpose in case such judgment had been already entered. The principle is quite well settled that parol evidence is admissible to show that a written contract, not under seal, of which there has been manual tradition, *was not to become a binding contract* until the performance or occurrence of some condition precedent resting in parol. *Nutting v. Minnesota F. Ins. Co.* 98 Wis. 26, and authorities there cited; *Wilson v. Powers*, 131 Mass. 539; *Pym v. Campbell*, 6 El. & Bl. 370; 2 Taylor, Ev. § 1135, Chamberlayne's notes; 2 Jones, Ev. § 478. This rule approaches closely to an infringement upon the principle that a written contract cannot be varied or contradicted by parol, and hence it is justly observed that such a defense is subject to suspicion, and that the rule should be cautiously applied and the facts clearly proven. *Reynolds v. Robinson*, 110 N. Y. 654. Furthermore, it is to be observed that the rule is that it may be shown that the contract is *not to become binding until the happening of some event or ascertainment of some fact*, but not that the contract is to be presently binding and to become void on the happening of some event. If a contract is executed and delivered with intent to take effect, it is not to be thereafter avoided by virtue of a condition annexed to the delivery by parol. Here is the difficulty in this case: the second finding of the special verdict is that the note and mortgage were executed under an agree-

ment that they should be void in case judgment had been previously entered in the Jenner action. This finding is ambiguous. It may mean that they were delivered with intent to have present effect, and to be thereafter avoided in a certain contingency. If such is its meaning, then the mortgage was a valid mortgage, and the policy of insurance was avoided thereby. Much of the testimony also supports this interpretation of the finding: Mr. Guernsey says that he asked *Mrs. Thorne* for a chattel mortgage *until he received notice from the clerk* of the entry of the judgment; and *Mrs. Thorne* says, "Mr. Guernsey asked if I was willing to have this mortgage *executed for a few days, until the judgment was entered*, when it should be null and void, and I told him I was." The facts, also, that the mortgage was at once filed, and the note never returned, though it was ascertained after a day or two that the judgment had been entered before the giving of the mortgage, tend persuasively to support this meaning of the finding. In fact, examination of the evidence convinces us that the clear and strong preponderance of the evidence supports this view, if in fact any agreement so improbable was ever made, and that if this finding is to be construed as meaning that it was agreed that the mortgage was not to go into effect at all unless the judgment had not been entered at the time, the finding must be set aside, as against the clear preponderance of the evidence. These remarks apply as well to the third finding of the jury, and these views necessitate reversal of the judgment.

We do not think, either, that the proof as to the value of the goods destroyed and damaged was so clear and conclusive that the court was justified in setting aside the finding of the jury and awarding the plaintiff the full amount of the policy. The proof of value was far from satisfactory.

By the Court.—Judgment reversed, and action remanded for a new trial.

HOOPER, Respondent, vs. HOOPER, Appellant.

March 17—April 4, 1899.

Divorce: Alimony: Allowance in gross.

1. Under sec. 2364, Stats. 1898 (providing that in actions for divorce the court may adjudge to the wife such alimony out of the estate of the husband, for her support and maintenance, as it shall deem just and reasonable, having always due regard to the situation of the parties and all the circumstances of the case), the court is not limited to making an allowance payable at stated periods, but may allow a sum of money payable in gross.
2. In an action for divorce brought by the wife it appeared, among other things, that the parties were about sixty years of age, had been married twenty years, and occupied a high social position; that defendant had property worth $80,000, and received a large income therefrom as well as from his professional business; and that the plaintiff was without fault except such as the defendant was in duty bound to condone. *Held*, that an allowance to the plaintiff of $7,000 payable in gross, together with a monthly allowance equal to about one seventh of the defendant's income, was not excessive.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

The appeal is from that part of the judgment in a divorce action awarding a permanent allowance to plaintiff. Plaintiff was sixty and defendant sixty-one years of age at the time of the trial. They had lived together as man and wife about twenty years, during which time plaintiff helped to rear to ages of maturity five children of defendant by his first wife, who were from four to seventeen years of age at the time of the second marriage. When such second marriage took place defendant was worth about $40,000 and plaintiff not anything. During a few years preceding the trial defendant gave his children property aggregating $20,000 in value, and was worth, when the case was decided, $80,000, yielding a yearly income of about $4,200, and he had in ad-

dition a large law practice. In addition to wearing apparel and personal property, when the cause was decided plaintiff was possessed of $500 given to her by defendant, $950 bequeathed to her by an aunt, and about $700 accumulated by keeping boarders subsequent to February, 1895, when the separation between the parties took place. In addition she had a claim against defendant for $500 on account of a marriage gift. The divorce was granted upon two grounds, either being adequate, and one free from any circumstance of excuse or palliation in the conduct of plaintiff. There was awarded to plaintiff out of defendant's property, as her separate estate, $7,000 and $100 per month during her life, in lieu of dower rights in defendant's real property, and in full discharge of all plaintiff's rights therein and all claims upon defendant's estate. Judgment was rendered accordingly.

C. D. Cleveland, for the appellant.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *T. W. Spence*.

MARSHALL, J. Appellant's complaint seems to be wholly of the award of a gross sum of money as part of the permanent alimony. The monthly allowance of $100, it is suggested, may be materially increased, if thought best, without complaint from appellant, if the decree giving plaintiff an estate of her own out of appellant's property be reversed. We have, with care, searched appellant's brief in vain for some good reason or the citation of some authority to support his claim. It is quite novel. It is, as we understand it, that in such a case no provision should be made for a divorced wife other than an allowance payable at stated periods by the former husband, sufficient for her support. That was the old doctrine of the ecclesiastical courts when alimony meant an allowance for the support of a wife while living apart from her husband under a sentence of judicial separa-

tion, the relations of husband and wife in some respects still existing between the parties, the sentence being subject to termination and full marriage relations substantially subject to resumption at the will of the parties. Then no duty was recognized to support a fully divorced wife. No reason whatever exists now for such a rule. Under our statutes alimony may go with a divorce dissolving the bonds of matrimony and restoring the parties to their original situation of being strangers to each other, so far as concerns marriage relations in any sense, as well as with a divorce from bed and board. The power of the court, where the circumstances, in the discretion of the trial court, seem to demand or justify it, is as ample to allow a sum of money payable in gross as alimony, as one payable in instalments or a monthly allowance. There can be no doubt about that. In *Williams v. Williams*, 36 Wis. 362, it is said that it is quite as competent for the court to assign to the wife absolutely a specific portion of the husband's estate or to order the payment of a gross sum of money as to award an annual allowance. Sec. 2364, Stats. 1898, provides that "the court may adjudge to the wife such alimony out of the estate of the husband, for her support and maintenance, . . . as it shall deem just and reasonable, . . having always due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties, and all the circumstances of the case." Thus the manner in which the wife's allowance shall be secured to her is left entirely to the court to be exercised as justice seems to require, having regard to the particular facts of each case. So the question of whether the right judgment for alimony was rendered here comes down to whether proper judicial discretion was exercised in administering the statute; and on that subject the rule is that the decision of the trial court will not be disturbed unless manifestly unjust.

It is not only permissible to make an allowance to a di-

vorced wife payable in gross, but in many, and in the judgment of some courts in most, cases it is the best method of settling the pecuniary relations of the parties. The trouble and unhappiness often resulting from keeping up some sort of relation of debtor and creditor between parties who are, legally, strangers to each other, yet so embittered by previous marital relations as to render embarrassing and exceedingly unpleasant any communication of one with the other even as to strictly business matters, is well known to all persons of average experience in life. The divorced husband often feels that the obligation to pay a sum of money at stated periods to his former wife is an unjust burden and one to be avoided if possible, which feeling ordinarily grows more intense as time continues. The divorced wife is generally made to feel that she stands in a position of a mere pensioner, living from day to day on forced contributions grudgingly made by one who looks upon her as an unjust incumbrance. In that way the wrong to the wife caused by breaking up her home is made to bear unnecessarily harshly upon and disquiet her subsequent life. Observations along this line were made in *Williams v. Williams*, resulting in a conclusion that where there is an absolute divorce it is advisable to end all relations between the parties, leaving them entirely independent of each other, if that can be practicably done; that such unhappy controversies as this should be ended in such a way as to dissolve all financial relations as effectually as all marriage relations, leaving nothing that will unnecessarily mar the subsequent life of the parties.

The learned trial court proceeded on the line indicated in *Williams v. Williams*, and with wise comprehension of the needs of the situation solved it in such a way as to leave plaintiff practically independent of appellant. That situation was as follows: A wife sixty years of age who had occupied a high social position as the companion of a man about her own age, for some twenty years; a man possessed

of property of the value of $80,000 at his own figures, and of a large income therefrom, as well as from professional business; no stain was on the life of the wife palliating the act constituting one of the causes entitling plaintiff to a divorce; no fault of the wife appeared which, in law and good morals, the husband was not in duty bound to condone, and which if he had condoned, instead of transgressing the obligations of marriage in a way that the wife could not overlook and was not called upon by any law or duty to do so, they might have continued to live together as husband and wife down to the end of their joint lives. In that situation the court said that the matrimonial bonds should be dissolved and the divorced wife, so far as consistent with certainty of future support, should be made independent of her divorced husband. To accomplish that he awarded her, as and for a separate estate, less than one tenth of appellant's property, taking his own figures for the value, and further allowed her a monthly instalment amounting to about one seventh of appellant's income, considering that derived from his property and a fair income from his business as well. It was further provided that such monthly instalments should be secured upon appellant's property so as to reduce to the minimum the danger of difficulty or unpleasantness to plaintiff in respect to collecting her income.

It is useless to try to test the justness of that determination by any rule, because there is none that can be applied. Precedents are helpful, of course, but no two cases are alike. It is often said in a general way that an allowance from a moiety to a third or less of the husband's income or estate is proper, according to circumstances. The age of the parties is to be taken into consideration, their social station, their previous life, their health, their family, the responsibilities of the respective parties after the separation as to the care and support of children, the circumstances leading up to such separation, the fault which destroyed the home, the guilty

party, the palliating circumstances if any, the length of time the parties lived together, the amount and character of the husband's property, his earning capacity, and that of the wife as well, and all the circumstances that in justice bear in any way upon the situation. Testing the judgment appealed from in that way, we are constrained to say that, while the learned circuit judge who tried the case amply provided for the future needs of plaintiff, he dealt so liberally with appellant that he has not only no reason to complain, but should rather feel supreme satisfaction in reflecting over the result. The plaintiff is made substantially independent of appellant at a cost to him of from one seventh to one tenth of his income and estate, and he is entirely freed from obligations to plaintiff, with whom he does not desire and has no right to live as her husband. He goes free and has the great bulk of his property and the income therefrom and his future earnings as well, aside from the amount to be paid to his former wife, freed of any claim by her, so that he may dispose of the same as he sees fit.

It is not true by any means that in such circumstances the allowance to the wife should be limited to just enough for her support, and that payable as she needs it, as appellant seems to urge. There is no reason for such a rule, and no authority for it that has been called to our attention, and none that we are able to find. Plaintiff was entitled to support from appellant in a way consistent with his wealth and station. Besides that, she possessed an inchoate interest in all his real estate and was one of his heirs presumptive, all of which has been taken from her, and the protection to which she was entitled under the marriage contract as well, and in lieu of that she has received the alimony complained of. In *Williams v. Williams* there was one child nineteen years of age, the husband worth $20,000 at a rather high valuation of mostly unproductive real estate, a homestead and household effects worth some less than $2,000, and per-

sonal property about sufficient to pay his debts, many of which were pressing him. He had no certain income. On such facts this court rendered judgment allowing to the divorced wife $3,000 besides the homestead and household furniture; a far more liberal allowance, as appears, than the one made in the decree appealed from. If precedents are to be relied upon as controlling, *Williams v. Williams*, which has never been criticised, is sufficient for this case.

More has already been said than was really required or would have been said but for the earnestness with which appellant contends that injustice has been done to him. However hard he may have tried to look at the situation in which he was placed with an unbiased mind, he evidently has not been able to do that successfully. To us no reason whatever is perceived for complaint by him of the judgment appealed from.

Some minor questions are mentioned and discussed in appellant's brief, which have been considered. They are not of sufficient significance, however, to affect the decision on this appeal.

By the Court.—The judgment of the circuit court is affirmed.

102	604
111	[1] 82
111	[1] 83
111	[3] 84
111	[2] 40
111	[4] 41
102	604
114	[3]250
114	[1]507
[2]44 LRA	565
47 LRA	104n
50 LRA	298n
53 LRA	900n

CITY OF MARSHFIELD, Respondent, vs. WISCONSIN TELEPHONE COMPANY, imp., Appellant.

March 17—April 4, 1899.

Telephone companies: Right to use highways: Municipal regulation.

1. The right given to telegraph and telephone companies by sec. 1778, Stats. 1898, to construct and maintain their lines upon or along highways, is subject to all reasonable regulations made by the respective municipalities.
2. A municipality may, in the exercise of a reasonable discretion, prohibit the setting of telephone poles in certain of its streets.

3. Where a city charter gives the common council authority to regulate by ordinance the placing of telephone poles, etc., in its streets, and provides that no obstruction shall be placed in the streets without a written permit from the board of public works, and that said board shall have power to determine the time and manner of using streets for the placing of such poles, subject to an appeal to the council, sec. 1778, Stats. 1898, confers no right upon a telephone company to occupy the streets of said city without the permission of the proper authorities, even though no regulation as to such use has been adopted; but application for such permission should be made to the board of public works and a reasonable time given for that body to act, and if its action proves unsatisfactory an appeal should be taken to the council.

4. In the absence of a proper and timely application to the board of public works in such a case, the court has no right to interfere to compel it to act.

APPEAL from an order of the circuit court for Wood county: W. C. SILVERTHORN, Judge. *Affirmed.*

The defendant *The Wisconsin Telephone Company* is a corporation organized under the laws of this state, and is authorized by its charter to build telephone lines and to conduct a telephone business in this state. It maintains seventy-five different telephone exchanges in the cities and towns of Wisconsin, with wires strung on poles connecting said exchanges with each other and with exchanges in other states. It has constructed a line from the city of Stevens Point westerly to the city of Chippewa Falls, passing just outside the northerly limits of the city of *Marshfield*, which was completed in the spring of 1898. It was desirous of establishing a public station in said city, and proposed to construct a line of poles along Central avenue to some convenient point where the station was to be located. Central avenue is the main business street of the city, and has been paved along the business portion thereof, and upon it the greater portion of the travel and business of the city is done. It has been the policy of the city to keep that portion of this street between D and Sixth streets clear of all obstructions,

and for more than five years it has uniformly denied to all persons the privilege of placing telephone, telegraph, electric light, or other poles in or along the same. In February, 1898, the city granted to R. L. Kraus and K. W. Doege an exclusive permit for fifteen years to erect and maintain a system of wires and poles upon the streets of said city, for the purpose of establishing a telephone exchange therein, upon certain conditions specified in the ordinance, and under the direction of the board of public works.

On October 14, 1898, the defendant with a force of men commenced the erection of a run of poles from the intersection of its main line with Central avenue, southerly along said avenue toward the central and main portion of the city, and placed and set a number of poles therein, without permission of any of the city authorities. The latter objected to this procedure, and under their direction the poles so set were chopped down and removed. Thereupon the city commenced this action to restrain defendants from placing any poles on Central avenue, or in any of the streets of the city, except under the direction and with the consent of the board of public works; claiming that the digging up of the soil and pavement and the placing of poles in said street would be a permanent injury and obstruction thereto. A temporary injunction was obtained and served. Thereupon defendants obtained an order to show cause why the injunctional order should not be vacated. On the hearing the defendants submitted a modified motion, to the effect that, if the court should be of opinion that the defendants should be restrained from constructing their line upon Central avenue, then that the order be so modified as to permit the line to be constructed upon some other streets in said city. Both motions were denied, and the original order was allowed to stand. This appeal is to review the order denying the motion to dissolve the injunction.

For the appellant there were briefs by *Miller, Noyes, Mil-*

ler & Wahl, and oral argument by *Geo. P. Miller*. They contended, *inter alia:* 1. The streets in the city of *Marshfield* belong to the public, not to the city. The city has no proprietary interest in a street. The construction and maintenance of a telephone line in a street is a public use of the street, the authority for which must be derived from the legislature. 2 Dillon, Mun. Corp. (4th ed.), §§ 656, 675; *Paine L. Co. v. Oshkosh*, 89 Wis. 460; *Milwaukee v. M. & B. R. Co.* 7 Wis. 85; *Sheboygan v. S. & F. du L. R. Co.* 21 Wis. 667; *Janesville v. Carpenter*, 77 Wis. 297; *Waukesha H. M. S. Co. v. Waukesha*, 83 Wis. 480; *Neshkoro v. Nest*, 85 Wis. 128; *Trester v. Sheboygan*, 87 Wis. 500. Power to regulate and control streets does not authorize the common council to grant telephone or other franchises. *Davis v. New York*, 14 N. Y. 506; 2 Dillon, Mun. Corp. §§ 715–717. The city of *Marshfield*, under its charter, had not only no authority to grant any telephone franchise, but particularly not an *exclusive* franchise. An exclusive franchise can be granted by the legislature or by a municipality upon express legislative authority. *Jackson Co. H. R. Co. v. Interstate R. T. R. Co.* 24 Fed. Rep. 306; *Wright v. Nagle*, 101 U. S. 791; *New Orleans G. Co. v. Louisiana L. Co.* 115 U. S. 653; *Saginaw G. L. Co. v. Saginaw*, 28 Fed. Rep. 534; *State v. Milwaukee G. L. Co.* 29 Wis. 454. 2. By the general statutes of the state, authority is given to all telephone companies to place poles along the streets and highways of the state. Sec. 1778, Stats. 1898. This statute was copied from Massachusetts (Laws of 1849, ch. 93). Sec. 3 of the Massachusetts act provides that the poles shall be located where the local authorities may provide. *Young v. Yarmouth*, 9 Gray, 388, 389. That section was not re-enacted in Wisconsin; and under our statute the company was authorized to place its poles along the highways of the state without the local authorities being required to first authorize the location of the poles. 3. Sec. 1778, authorizing the con-

struction of telephone lines upon the streets of a city, does not deprive the city of its police control. *State ex rel. Wis. Tel. Co. v. Janesville St. R. Co.* 87 Wis. 79, and cases cited. The company had the right to place its lines of poles along the streets of the city, subject to the right of the city to pass regulating ordinances in the exercise of its police power; but the city could not wholly exclude the company. *Wis. Tel. Co. v. Oshkosh*, 62 Wis. 40. 4. Sec. 7, ch. XI, of the *Marshfield* city charter (ch. 160, Laws of 1891) does not change the general rule that telephone companies can construct their lines along streets without first obtaining permission from the local authorities. 5. A court of equity will not, by injunction, enforce a void exclusive telephone ordinance. Even a municipality coming into a court of equity must be willing to do equity or relief will be denied.

P. A. Williams, attorney, and *B. R. Goggins*, of counsel, for the respondent, argued, among other things, that while the streets in the city of *Marshfield* belong to the public, the city has nevertheless full control of its streets, and in this respect represents the public in relation thereto. *Waukesha H. M. S. Co. v. Waukesha*, 83 Wis. 475; *Jamestown v. C., B. & N. R. Co.* 69 Wis. 648; 2 Dillon, Mun. Corp. (4th ed.), § 659; *Madison v. Mayers*, 97 Wis. 399, 413; *Eau Claire v. Matzke*, 86 Wis. 291; *Neshkoro v. Nest*, 85 Wis. 126. The erection of a run of poles along a public street not only results in the temporary digging up and disturbance of its soil and pavement (as in *Waukesha H. M. S. Co. v. Waukesha, supra*), but also results in its permanent obstruction, and is a nuisance *per se*. 2 Dillon, Mun. Corp. § 698; Elliott, Roads & S. 478, and cases cited; Keasbey, Electric Wires, 45; *State v. Berdetta*, 73 Ind. 185, 193; *St. Louis v. W. U. Tel. Co.* 148 U. S. 92. Telephone companies are authorized by law to enter upon the highways and streets of the state only upon condition that they obtain from the respective towns, cities, and other municipalities the consent of their

several governing bodies. *Eels v. Am. T. & T. Co.* 143 N. Y. 133; *Zehren v. Milwaukee E. R. & L. Co.* 99 Wis. 83; *Chicago & N. W. R. Co. v. M., R. & K. E. R. Co.* 95 Wis. 561. A telegraph or telephone line cannot be constructed on a public highway or street, except with the consent of the state. 2 Cook, Stock, §§ 930, 931; *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 51; *Cater v. Northwestern Tel. Exch. Co.* 60 Minn. 539. The general plan in force in most of the states is for the legislature, in reference to such matters, to give its consent by general enactment in advance, but requiring the consent of the municipality in each individual case. 2 Cook, Stock, § 913; 2 Dillon, Mun. Corp. § 719; Elliott, Roads & S. 484, and cases cited. And privileges granted by the legislature to such corporations are strictly construed against the corporation, and nothing passes but what is granted in clear and explicit terms. *People ex rel. Third Ave. R. Co. v. Newton*, 112 N. Y. 397. Even where the power of the municipality is, by the legislature, restricted to the designation of the streets and of the manner of placing the poles therein, proper application to the proper authorities is held to be a condition precedent to the right to set up poles. *New York & N. J. Tel. Co. v. East Orange*, 42 N. J. Eq. 490; *Broome v. N. Y. & N. J. Tel. Co.* 49 N. J. Law, 624; *New York & N. J. Tel. Co. v. Broome*, 50 N. J. Law, 432; *Winter v. N. Y. & N. J. Tel. Co.* 51 N. J. Law, 83. See, also, *Suburban L. & P. Co. v. Boston*, 153 Mass. 200; *Pierce v. Drew*, 136 Mass. 75.

BARDEEN, J. Both parties admit the public character of the streets of a city and the almost omnipotent control of the legislature over their use. The city does not own, and cannot alien, its streets. It cannot rightfully authorize obstructions therein without legislative authority. Its duties and obligations with respect thereto are defined in its char-

ter. The general law grants powers and privileges to persons or corporations like the defendant company, to be exercised by municipal consent or subject to municipal limitations. Sec. 1778, Stats. 1898, under the interpretation of this court, authorizes the use of the highways of this state by corporations like the defendant, by their poles and wires, provided they are so set as not to obstruct or incommode the public use thereof. *Wis. Tel. Co. v. Oshkosh*, 62 Wis. 32; *Roberts v. Wis. Tel. Co.* 77 Wis. 589. And see *State ex rel. Wis. Tel. Co. v. Janesville St. R. Co.* 87 Wis. 72. It is conceded by appellant that this section does not deprive cities of their power of police control over the manner in which such work shall be done, and that they may adopt, by ordinance, all reasonable regulations for the location and use of telephone poles and wires in the streets. Sec. 4, subch. IV, ch. 160, Laws of 1891 (plaintiff's charter), provides: "The common council shall have authority by ordinances, resolutions, by-laws or regulations: . . (26) To lay out, make, open and keep in repair, alter or discontinue, any highways, streets, lanes and alleys, and to keep them free from incumbrances and to protect them from injury. (27) To establish and alter the grades of streets, and to regulate the manner of using the streets in said city, and to protect the same from injury by vehicles used thereon."

Construing similar provisions in the charter of the city of Janesville, this court, in 87 Wis. 72, before cited, said: "There can be no question, at this late day, but that our municipal corporations may make all reasonable regulations for the location and use of electric wires in the streets, and require all reasonable safeguards for the same. The question is virtually settled in this state by our own decisions." The authorities and decisions there cited seem fully to warrant that conclusion. That, in the exercise of this power, the city authorities may go so far as to prohibit the incumbering by telephone poles of certain of its streets, in the exercise of a

reasonable discretion, is equally clear. Such right necessarily follows from the grant of the power to regulate. It is also implied from the fact that the dominant purpose of a street is for public passage, and any appropriation of it by a legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. *Hudson River Tel. Co. v. Watervliet T. & R. Co.* 135 N. Y. 393; *Utica v. Utica Tel. Co.* 24 App. Div. 361. Or, to state the rule in another way: "All legislative grants to private corporations to occupy streets with electrical appliances are impliedly, if not expressly, subject to the police powers of the municipality, both to dictate and to change the location of such plant." *Monongahela v. Monongahela E. L. Co.* 4 Am. El. Cas. 53.

But, it is said, the city of *Marshfield* has never passed any ordinance or by-law regulating the placing of poles in its streets, and it is argued that, as defendants were not violating any regulation in that respect, this action cannot be maintained. Sec. 7, subch. XI, of the charter provides: "No building shall be moved through the streets or obstructions be placed therein without a written permit therefor granted by the board of public works; said board shall have power to determine the time and manner of using the streets for laying or changing water pipes, or placing and maintaining electric lights, telegraph and telephone poles; provided, however, that the decision of said board in this regard may be appealed to the common council." This provision gives to the board of public works ample power to exercise control over the streets of the city, subject to appeal to the council. Whether it gives them the power to totally prohibit the incumbering of the streets of the city by telephone poles is not necessary to decide. The city makes no such claim, but it does insist that its streets shall not be so incumbered except under the direction of the proper officers.

The record shows that the defendant Gallagher, repre-

senting the company, went to Mr. Hoffman, the chairman of the board of public works, about 11 a. m. of October 14th, and said he was ready with a crew of men, and wished the consent of the board to set a line of poles along Central avenue from its main line to the business part of the city. He was informed that the chairman had no power to give such consent, that some of the members were out of the city, but that a meeting of the board would be called not later than the evening of that day to act upon such request. Gallagher replied that he was ready with his men to set the poles, and would not wait for such meeting; that his instructions were to set the poles immediately, and he would do so, independent of the board or the other city authorities, which he forthwith proceeded to do until forced to stop. It is such conduct as this that creates and fosters feelings of prejudice against corporations. It was in utter disregard of the city's rights.

The city had theretofore granted a franchise for a local exchange. Under it the local company had a right to use certain of the streets for its poles, under the direction of the board. It cuts no figure in this case that the franchise was exclusive for a limited time. If it was wrong, it did not justify the defendant in committing another wrong. The fact that the common council had adopted no ordinances, or the board of public works had passed no regulations, in relation to pole setting, affords the defendant no justification for its procedure. While it is true the city might have enacted ordinances on the general subject of the incumbering of the street, yet from the very nature of the situation it was impossible to anticipate the needs or desires of a company coming in as the defendant did. Before the board could act intelligently, it was necessary for them to know something about the desires and intentions of parties desiring to use the streets. When the situation had sufficiently developed that the board could act understandingly, it became its duty to act, and to act reasonably. It was likewise

incumbent upon the defendant to make its purposes and wishes known to the board, and to give them a reasonable time to take action. The defendant had no right to enter upon the streets of the city, even though no prohibitory ordinances had been passed, and occupy them as it pleased, and set up poles that were obstructions, at will. Its right to go upon the streets with its structures was limited by the charter provisions mentioned, and, until it had complied with their requirements, it was without legal justification. Here was a city of 5,000 people, with waterworks, electric lights, a local exchange, and paved streets. Considerations of local pride seemed to demand that their main business street, in the business center, should be kept clear of obstructions or incumbrances. The board had an undoubted right, in the exercise of a reasonable discretion, to prohibit the incumbering of Central avenue with wires and poles. The discretion of that body could be controlled by the council on appeal. It was not within the power of the council to determine the time when or the manner in which defendant might set up its line, except in the exercise of its appellate jurisdiction over the board.

We do not say that the city has the right to entirely exclude the defendant from entering the city, because, under the facts, that question is not before us. We do hold, however, that, before the defendant can occupy any of the streets, application should be made to the board of public works, and a reasonable time given for that body to act. Its action is subject to review by the council, on appeal, if not satisfactory. In the exercise of its powers, the council may consider that the rights of the defendant under the general law are in subordination to the police powers vested in the city authorities, and may adopt all reasonable regulations necessary to prevent its streets from being obstructed or incumbered. If it acts contrary to law, no doubt an ample remedy exists.

Defendant's so-called modified motion must also fail. The court will not assume to control the action of the board of public works. When a proper and timely application has been made to the board, they may be compelled to act. Until then the court has no right to interfere.

By the Court.— The order of the circuit court is affirmed.

WESTERN WHEELED SCRAPER COMPANY, Respondent, vs. CHIPPEWA COUNTY, Appellant.

March 17 — April 4, 1899.

Contracts: Construction: Warranty: Notice of defects: Evidence: Court and jury: Counties: Ultra vires: *Purchase of stone-crusher.*

1. The defendant county agreed to purchase a stone-crusher of plaintiff under a contract warranting the machine to be thoroughly made, of good material and workmanship, and capable of doing the work for which it was intended, and providing that three days should be allowed for testing the machine, at the expiration of which the county agreed to make settlement. *Held*, that the county was not obliged to accept the machine unless it was demonstrated during such three-days test that it was capable of crushing such rock as existed in the county, without breakage of substantial parts.
2. The contract in such case also provided that, if any part of the machinery should prove defective or fail to fill the warranty, the defendant should notify the plaintiff, etc., and that continued possession of the machine for thirty days after it was set up should be conclusive proof that it fulfilled the warranty. *Held*, that such notice was required only where defects were discovered after the machine had been tested, and not where it failed to meet the prescribed tests made under plaintiff's supervision.
3. In an action on such contract the defendant pleaded failure of the machine to comply with the warranty, and its evidence tended to show that it was rejected, by the committee of the county board having the matter in charge, at the end of the third day's test, because of defects in the swinging die; that an arrangement was then made between one member of said committee and plaintiff's

agent by which the latter was to take possession of the machine, obtain new dies, and run it for the town of which said member was chairman; that a majority of the committee were present at the test, but that the machine worked no more satisfactorily than before. On the other hand the plaintiff's evidence tended to show that the committee agreed to said further test; that it continued four and three-fourths days; and that the machine worked satisfactorily during such time, except that the swinging die began to show signs of wear, but not sufficient to disable the machine. *Held*, that it was error for the court to submit to the jury only the question whether the last-mentioned test was made within a reasonable time after the first die was found defective.

4. Under sec. 1308, Stats. 1898 (authorizing the county board to adopt main traveled roads as county highways, to keep the same in repair, and to designate other roads for the purpose of making repairs thereon without adopting them as county roads), a county may purchase a stone-crusher; and the fact that a purpose was expressed to rent such machine to the several towns did not take away such power.

APPEAL from a judgment of the circuit court for Dunn county: E. W. HELMS, Circuit Judge. *Reversed.*

For the appellant there was a brief by *C. B. Culbertson*, district attorney, and *W. M. Bowe*, and oral argument by *Mr. Bowe.*

For the respondent the cause was submitted on the brief of *Connor & Leonard.*

CASSODAY, C. J. This is an action to recover $915, as the purchase price of a rock-crushing machine. The complaint was upon a contract therefor, which was in writing, and consisted of a written order, signed by a committee of the defendant's board of supervisors, dated April 18, 1896, to the effect that the plaintiff should ship to the defendant on or about April 26, 1896, subject to the conditions therein named, "one No. 10 Western Stone Crusher," described; that the plaintiff should furnish a competent man to superintend the putting of the above machinery in place; that "the Western Stone Crusher is warranted to be thoroughly

made, and of good material and workmanship, capable of doing the work for which it is intended, without breakage, for the term of one year from date of sale;" that "we guarantee the 9x15 machine to crush from ten to twenty tons per hour, with two-inch toggle, according to nature of material,—other sizes in like proportion;" that, "after the above machine is set up and ready for work, three days' time shall be allowed for testing, at the expiration of which time we agree to make settlement;" that, "if any part of the machinery should prove defective, or fail to fill the warrant in accordance with the terms named herein, we agree to notify the *Western Wheeled Scraper Co.*, at Aurora, Ill., and also the agent from whom the goods were purchased;" that the "company shall be given a reasonable time to remedy the defects and to make the machinery do the work as warranted, and we are to render them friendly assistance;" that, if it is not able to make the machinery do the work warranted, it thereby agrees to remove them at its own expense, and to refund any payment that has been made; that continued possession of the machine for thirty days after the same is set up shall be deemed conclusive proof that it has fulfilled the warranty, unless notice in writing to the contrary is received by the *Western Wheeled Scraper Company*, as before stated; that "for above-specified goods the price is to be $915, which amount we hereby agree to pay" as therein stated.

The complaint further alleges, in effect, that April 22, 1896, the defendant duly accepted and confirmed the agreement to so purchase, and the written order therefor, and duly ratified and confirmed the acts of its committee in relation thereto, and appointed a committee of five of its board to attend the testing of the machine; that the plaintiff, in accordance with the terms of the agreement and order, duly delivered the machine described to the defendant, and at the time appointed for the testing of the same the plaintiff

fully satisfied and fulfilled every requirement as to the kind and capacity of the machine and its ability to do the work for which it was intended, and performed and fulfilled all of the conditions and obligations on its part to be performed under the agreement and order, and demanded the purchase price, which the defendant neglected and refused to pay, or any part thereof; that November 7, 1896, the plaintiff duly filed its claim for the purchase price with the county clerk; that November 18, 1896, the defendant, by its board of supervisors, disallowed the claim and every part thereof; that December 31, 1896, the plaintiff duly appealed to the circuit court from such disallowance.

The defendant answered by way of admissions, denials, and counter allegations to the effect that the defendant's committee and the agent furnished by the plaintiff for that purpose met for the purpose of testing the machine May 7, 1896, and afterwards, at the request of the plaintiff, met with said agent for further tests of the machine, at each of which times a thorough test of the machine was made by said agent and the defendant's committee; that at each and all of such tests it was found and determined by the committee, as the fact was, that the machine was defective and insufficient and failed to comply with the warranty contained in the written agreement, in the following particulars: That the machine was not made of good material, that the workmanship was not good, nor was the machine capable of doing the work for which it was intended, or any other work, nor was the machine capable of crushing from ten to twenty tons of rock per hour with two-inch toggle, or otherwise, but on the contrary it was demonstrated at both of such tests, and the fact was, that the machine would work for only a short time, and then important and essential parts of the machine, by reason of inferior workmanship and material and by reason of the unfitness of the machine to do the work for which it was intended, would become broken, worn out,

and useless, and the machine thereupon would become incapable of doing any work whatever; that the defendant had complied with all the terms and conditions of the agreement on its part to be performed, and notified the plaintiff and its agent of the defects and insufficiency of the machine and its failure to comply with the agreement, and had given the plaintiff a reasonable time to remedy the defects and make the machine do the work as warranted, and rendered the plaintiff friendly assistance, but that the plaintiff was not able to make the machine do the work as warranted, or comply with the terms and conditions of the agreement; that within the time stipulated in the contract the defendant had rescinded the agreement for the reasons stated, and refused to accept of the machine, and thereupon notified the plaintiff, in writing, of such rescission and refusal, and returned the machine and appliances used in connection therewith to the plaintiff.

At the close of the trial the court submitted to the jury no verdict, but only one question, which, with the answer of the jury thereto, is as follows: "Q. Was the day the third test was begun a reasonable time, after the first die was found defective, within which to remedy the defect in the machine by the plaintiff company? A. Yes." Thereupon judgment was entered on such finding in favor of the plaintiff for $1,202.36 damages, interest, and costs, from which judgment, and the whole thereof, the defendant appeals.

It is undisputed that several different tests of the machine, as provided in the contract, were made under the supervision of the plaintiff's expert, Warren, and its agent, Burk, who sold the machine, in the presence of the defendant's committee; that the first of such tests took place May 7, 1896; that such test was continued by and in the presence of the same persons May 8, 1896; that another test was made by and in the presence of the same persons May 18, 1896.

There is evidence on the part of the defendant tending to

prove that the defendant supplied the power, men, and material at each of such tests, all to the satisfaction of such agents of the plaintiff; that before the close of the day May 7, 1896, the corrugations broke and wore off the swinging die, and the product or rock operated upon changed from the cubical form to large, flat pieces; that the test was commenced May 8, 1896, with the swinging die reversed; that the other end was tried, with the same result as on the previous day; that at first the rock was properly crushed, but later in the day the corrugations chipped off, letting coarse material through; that the plaintiff's agents acknowledged the failure of the test, and requested a postponement of the third day's test, so as to allow them to get a new die; that such agent notified the plaintiff accordingly, and a new swinging die was forwarded; that the third day's test took place May 18, 1896, and the result was the same as on the two former days; that at first the work was satisfactory, but that after the machine had been running an hour or two the die began to give out; that they continued to run the machine a little over a half a day, when the product or rock operated upon began to change, the same as on the two previous days (that is, the rock came away in large, flat pieces, instead of smaller pieces), and finally they quit work between 3 and 4 o'clock that afternoon; that the defendant's committee appointed to witness such test thereupon held a meeting near the place of such test, and all five unanimously agreed to and signed this statement, to wit: "Eagle Point, May 18th, 1896. We, the committee, find, on and after a three-days test, that the machine is not able to do the work; and we do not accept it."

The evidence for the defendant further tends to prove that the committee thereupon caused a copy of such statement to be served on such agent of the plaintiff; that on the same day the committee caused a copy of such statement to be sent by letter to the plaintiff at its office in Aurora, Illi-

nois, and in the letter stated, in effect, that the machine was in the town of Eagle Point, awaiting their further order, that it was not accepted, because the dies did not stand the stone they were crushing, that the defendant declined payment, and that the machine had failed to comply with the warranty mentioned in the contract; that the next day the committee telegraphed the plaintiff, at its office: "Rock crusher now subject to your order. Have written you;" that after the committee had rejected the machine on the evening of May 18, 1896, one of the committee, who was also chairman of the town board of Eagle Point, talked with the plaintiff's agent, Burk, and told him that, if he wished to give his machine a further test, the town of Eagle Point had made all arrangements therein to put that machine at work if it would prove satisfactory, and if he would take possession of the machine (which he at first refused to do) then he could work the machine as long as he pleased in Eagle Point, and that town would furnish the team, haul the material, and take care of it, and that unless he did so they would have nothing more to do with it, and that such test would be under the direction of that town; that such agent finally accepted of such proposition, to wit, that he would take possession of the machine, and get new dies, and work it in Eagle Point; that another member of such committee was present when such conversation was had with such agent; that upon the request of such agent, and in pursuance of the clause of the contract requiring the defendant to give friendly assistance, a majority of the committee were present at the testing of the machine in such town June 12, 1896, but that the same worked no more satisfactorily than before.

On the other hand, there is evidence on the part of the plaintiff tending to prove that after the defendant's committee rejected the machine on the afternoon or evening of May 18, 1896, it was agreed on the part of the com-

mittee and the plaintiff's agent that there should be a further test of the machine on or about June 4, 1896; that such test was commenced on that day, and continued four days and three quarters, and the machine during that time worked satisfactorily, except that at the end of the time the swinging die began to show signs of wear, but not sufficient to be disabled; and that such test was in the presence of Hopkins, who was chairman of the town and a member of the committee, and who testified that the steel die during that test had worn down nearly smooth, and the product then became unsatisfactory.

1. Error is assigned because there is no verdict covering the questions put in issue by the pleadings and litigated upon the trial. The important questions so at issue and litigated were whether the machine was thoroughly made, and of good material and workmanship,—capable of doing the work for which it was intended, without breakage, as it was warranted to do. True, such warranty was to continue for the term of one year from the date of sale, but this was on condition that it was capable of doing the work for which it was intended. In order to determine that fact, the contract provides that, after the "machine is set up and ready for work, three days' time shall be allowed for testing, at the expiration of which time" the defendant thereby "agreed to make settlement." This certainly does not mean that the defendant was to make such settlement regardless of the result of the test. It manifestly means that the defendant was only to make such settlement in case the machine reasonably stood the test. Some unexpected breakage of some minor part of the machine, with no opportunity to remedy the same, may not be good ground for rejecting the machine; but the defendant was not bound to accept of the machine and make settlement therefor unless it should be demonstrated during such three-days test that it was capable of doing the work for which it was intended, with-

out any substantial breakage. The work which it was so intended to perform was to crush such rocks as existed in *Chippewa* county. The defendant, with the knowledge of the plaintiff, contracted for the machine for that very purpose. The defendant had no power or authority to buy it for the purpose of crushing rocks in any other county. Unless it was capable, under the superintendence of a competent man furnished by the plaintiff, to crush such rocks as existed in *Chippewa* county, it would be of no use to the defendant. If the machine stood the three-days test reasonably well, then the defendant was bound to take the machine and make settlement therefor. If the machine, under the plaintiff's expert superintendent and its agent, could not be made to do the work for which it was so intended, without the breakage of substantial parts, then certainly the defendant was not required to give notice of such failure. But if it stood such three-days test, and thereafter proved defective or failed to fulfill the warranty, then the defendant was to give notice as stipulated, and the plaintiff was to be given a reasonable time to remedy the defects and to make the machinery do the work as warranted, with the friendly assistance of the defendant. This is apparent from the fact that the agreement makes continued possession of the machine for thirty days after being set up conclusive proof that it has fulfilled the warranty, "unless notice in writing to the contrary is received by the" plaintiff. All questions as to whether the machine, after it was set up and ready for work, stood the three-days test (that is to say, whether the machine was capable of doing the work for which it was intended, without breakage of any substantial part), or whether any substantial part was made of good or poor material, were taken from the jury. The only question submitted to the jury was whether the trial of the machine from June 4 to June 8, 1896, was a reasonable time within which to remedy the defect, after the first die was

found to be defective, May 7, 1896. The charge of the court in submitting that question ignored the questions so put in issue by the pleadings and litigated on the trial. Such last trial was seventeen days after the three-days test had terminated. We must hold that the verdict does not determine the questions at issue and litigated upon the trial. *Sherman v. Menominee River L. Co.* 77 Wis. 14.

2. We cannot hold that there was any error in refusing to direct a verdict in favor of the defendant for want of power in the county to make the purchase. The statute authorized the county board to adopt any main traveled highway, or parts thereof, as a county road, and to keep the same in repair. So it may designate any such highways, or parts thereof, for the purpose of expending money in repairing the same, without adopting them as county roads or assuming any responsibility for injuries thereon, and may annually levy a county road tax not exceeding $8,000 for improving such highways. Stats. 1898, sec. 1308. The action of the defendant's committee appears to have been expressly authorized by the county board. The mere fact that a purpose was expressed to rent such machine, when purchased, to the several towns, even if *ultra vires*, did not take away the power to purchase the machine. The powers given by the statute cited by implication included the power to make the purchase. *Ellinwood v. Reedsburg*, 91 Wis. 131.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

HIBBARD, Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

March 18 — April 4, 1899.

Railroads: Personal injuries: Evidence: Court and jury.

In an action against a railroad company to recover for injuries sustained by an employee whose foot had been run over while he was attempting to seal the end door of a car attached to the tender plaintiff's testimony that his foot was caught between the main rail and a guard rail and injured by the wheel of the tender is *held* insufficient to sustain a finding by the jury to that effect, where such testimony showed that it was not based upon recollection, but was the result of inference, and the appearance of the shoe worn upon the injured foot and plaintiff's position after the accident were consistent only with the theory that his foot was caught between the main rail and the wheel.

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Reversed.*

This is an action for personal injuries. The facts shown upon the trial were that the plaintiff was employed as a warehouseman by the defendant, at its station at New Richmond in this state, on the 27th of June, 1894, and that one of his duties was to seal the doors of all the freight cars which were loaded at New Richmond before they left the station. On the day of the accident a freight car had been loaded with flour at a mill about a quarter of a mile from the freight depot at New Richmond. A freight train came in, and the engine uncoupled from the train and brought this car to the station, preparatory to placing it in the train. The plaintiff claims that the engine and car came to a stop upon the house track, and that while they were so standing still the plaintiff, by direction of one of the brakemen of the train, went in between the car and the tender of the engine, and was climbing up to seal the door in the end of the freight car toward the engine, when the engine suddenly

moved, without warning, backward, and the plaintiff's right foot was caught between a defectively blocked guard rail and the main rail, and the fleshy portion of the bottom of the foot cut off by the rear wheel of the tender. The tender was stopped before it had run half its length, and the plaintiff was then outside of the rails, hopping away from the track upon his left foot, with no injury except the loss of the bottom of his right foot.

The train employees assert that the engine never came to a standstill, and that the plaintiff must have entered between the tender and the car, and begun to climb up, while they were in motion; and they also deny that the plaintiff was injured at any place where there was a guard rail, and claim that his foot was caught under the rear wheel of the tender and on the main rail of the track. Whether the train was moving or not at the time the plaintiff stepped between the tender and the car, the fact seems to be certain that he stepped in from the west side, put his left foot upon the brake beam of the tender, his left hand holding the tool box of the tender, his right hand either reaching for or holding the handhold upon the end of the freight car, and his right foot either upon the main rail or just inside of the main rail upon the ground.

The plaintiff claims to recover because of defective and rotten blocking of the guard rail, by reason of which, he claimed, his foot was caught.

A special verdict was returned, by which it was found (1) that the engine and car came to a full stop before the plaintiff attempted to seal the car door; (2) that such stop was more than momentary; (3) that the plaintiff went between them while they were so stopped; (4) that the engine bell did not ring before the engine was again started backward; (5) that the plaintiff's foot was caught between the main rail and the guard rail; (6) that his foot was not on the main rail when he was injured; (7) that the defendant

did not exercise ordinary care and prudence in keeping the end of the guard rail blocked; (8) that such failure was the proximate cause of the plaintiff's injury; (9) that the plaintiff was not guilty of contributory negligence; and (10) that his damages were $4,750. On this verdict judgment was rendered for the plaintiff, and the defendant appeals.

For the appellant there was a brief by *L. K. Luse* and *H. L. Humphrey*, attorneys, and *Thomas Wilson*, of counsel, and oral argument by *Mr. Luse* and *Mr. Wilson*.

W. F. McNally, for the respondent.

WINSLOW, J. Upon the first trial of this case (96 Wis. 443) it was not suggested that there was any defect in the track or blocking which caused or contributed to the plaintiff's painful injury. In fact, it is admitted by the plaintiff himself that upon the former trial he testified that when the engine moved back his right foot was caught under the rear wheel of the tender and run over, thus cutting off the fleshy portion of the bottom of the foot; but he says that since *that* trial he has looked over the ground and discovered that his foot must have been caught between the guard rail and main rail by reason of defective blocking. The jury have found this to be the fact, and if their finding in this regard is supported by the evidence there seems no substantial reason why the judgment should not be affirmed. Careful examination of the evidence compels us to say, however, that the plaintiff's present claim is against the great preponderance of the evidence. In the first place, it must be remembered that the plaintiff admits that upon the first trial of the case he testified repeatedly that his foot was caught under the wheel of the tender upon the main rail; and even upon the second trial he does not say that he can remember that his foot was caught between the guard rail and the main rail. It is true that he says upon his direct examination that his foot was caught in the guard rail; but

upon cross-examination he admits that he does not know whether the wheel ran over his foot or not, that as the tender passed him he was outside of the rails, that he could not say whether his foot was on the rail or not, that it might have been on the main rail from the time he placed it there until he was hurt, that he never knew that his foot was caught by the guard rail until after the first trial of the case, and that he does not know of his own knowledge what part of his foot came in contact with the guard rail. These admissions, and more that might be quoted, demonstrate very clearly that he has no recollection or knowledge of his foot being caught in the guard rail, but is simply reasoning the matter out.

But there is evidence in the case, which is not to be shaken or gainsaid, which speaks emphatically against the plaintiff's present theory, and that is the evidence of the plaintiff's shoe which was run over and which is in the same condition now as then. This shoe bears well-defined marks of the course of the wheel over it. They cannot be mistaken; nor can it be argued that the marks result from pressure between the flange of the wheel and the guard rail. From this shoe, with its markings, it is morally certain that the wheel passed over the foot from the heel toward the toe, beginning on the outside of the heel and crossing diagonally to the inside. When the shoe is put upon the model of the rail sent up with the case, the demonstration is so clear that all doubt is removed; but, of course, it is impossible to adequately present that demonstration by mere written words. This explanation also accords with practically all of the testimony of the other witnesses in the case. The shoe was found upon the main rail, between the two rear wheels of the tender; there was flesh, and a part of the stocking, crushed, upon the main rail; the plaintiff was entirely outside of the rails when the tender stopped,—all of which facts are utterly inconsistent with the plaintiff's claim that the foot was crushed between the guard rail and main rail.

But there is one other fact which makes the plaintiff's contention quite incredible. If it were possible that the foot was crushed between the guard rail and the main rail, then the pressure marks on the shoe demonstrate that the whole right leg must have been in front of the wheel, and would infallibly have been run over, and his body dragged under the tender; whereas, in fact, the plaintiff received no injury save the cutting off of the flesh on the bottom of his foot, and was not under the tender when it stopped, but outside of the rails.

To sum up: The theory that the foot was caught under the wheel of the tender on the main rail, beginning at the heel, satisfies all the oral evidence, as well as the mute evidence of the shoe itself; while the theory that the foot was caught by the guard rail is not testified to by any witness, and is entirely at war with every established fact in the case.

Serious as the plaintiff's injury, suffered while attempting to perform his duty, undoubtedly was, we are compelled to say that a verdict that his foot was caught between the guard rail and the main rail is unsupported by the evidence and cannot be sustained.

By the Court.—Judgment reversed, and action remanded for a new trial.

O'Brien and another, Appellants, vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company, Respondent.

March 18—April 4, 1899.

Court and jury: Nonsuit: Direction of verdict.

1. The rule that disputed questions of fact on evidence are to be answered by the jury applies only where the evidence is such that there is room for different reasonable inferences therefrom. If the truth of propositions of fact upon which the right of recovery depends be not within the range of reasonable probabilities, no question in regard to them need be sent to a jury though there is evidence as to their truth.

2. To entitle plaintiff to have his alleged cause of action submitted to a jury for decision, he must produce evidence from which sensible men of unbiased minds can reasonably decide the issues in his favor.

3. The rule that, in determining whether a nonsuit should be granted or a verdict directed, the evidence of plaintiff only should be considered, contemplates the consideration of such evidence in the light of matters of common knowledge and facts established beyond reasonable controversy in the case, whether by evidence of plaintiff or defendant or both.

4. If the evidence of plaintiff, taking the most favorable view of it in his behalf that it will reasonably bear, including all reasonable inferences therefrom, and assuming that it establishes all that it tends to establish when viewed in the light of conceded or undisputed facts, will not support a verdict in his favor, the verdict, on request being made therefor, should be directed against him.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Affirmed.*

The appeal is from a judgment entered pursuant to a directed verdict in defendant's favor.

The action is for the recovery of damages for breach of a contract to convey land, on facts alleged in substance as follows: May 1, 1883, defendant contracted in writing to sell and convey to D. M. Sabin and Walker, Judd & Veazie, lands described in Schedules A and B attached to the complaint, those in A to be conveyed when paid for and those in B when defendant should acquire title thereto, the consideration being two dollars per thousand feet on the standing pine on the lands according to estimates furnished the purchasers by defendant. July 20, 1883, the purchasers paid the full amount of the purchase price, part in cash and part in notes, each note being for one twentieth of the deferred amount, one to mature every six months and the last on February 1, 1893. Before the commencement of this action plaintiffs became owners of the conveyed lands and all rights under the aforesaid contract. After they became such owners, they

made all the deferred payments as they fell due, till all were paid. The total amount paid for the land in Schedule B was $16,000. Such lands were never conveyed as per contract, but for a valuable consideration were released by defendant to the United States, thereby disabling it from complying with the requirements of such contract. Defendant had a good title to the Schedule B lands, and its conveying the same in breach of the contract entitled plaintiffs to damages in the sum of $48,000, that being the value of the lands in excess of the contract price. Judgment was demanded for $64,000 and interest on the $16,000 alleged to have been paid for the Schedule B lands, to wit: On $2,500 from February 1, 1892, on $6,700 from August 1, 1892, and on $6,700 from February 1, 1893.

Defendant answered that before the alleged making of a land contract with Sabin and Walker, Judd & Veazie it agreed to sell the lands mentioned in the complaint, under certain conditions, to one Humbird, who thereafter assigned his contract to Sabin and Walker, Judd & Veazie, and that in part performance of such contract it conveyed the Schedule A lands and before the action was commenced received full payment therefor. The answer admitted that the Schedule B lands had not been conveyed under the Humbird contract, and took issue with all the allegations of the complaint as to plaintiffs being entitled to the Schedule B lands or damages for nonconveyance of the same, or the recovery of money paid therefor, or that any money had been so paid. The court decided that there was no satisfactory evidence that defendant ever made a contract to convey the Schedule B lands, other than the one with Humbird, or that any money had been paid to defendant on such contract or otherwise for such lands, and therefore directed a verdict for defendant, on which judgment was entered and from which this appeal was taken, as before stated.

For the appellants there was a brief by *S. J. Bradford,*

attorney, and *Clapp & Macartney*, of counsel, and oral argument by *N. H. Clapp*.

For the respondent there was a brief signed by *H. L. Humphrey* and *Thomas Wilson*, attorneys, and *Thomas Wilson*, of counsel, and the cause was argued orally by *Thomas Wilson*.

MARSHALL, J. The main question here is, Was there evidence from which the jury could reasonably have found facts requisite to a recovery by plaintiffs on the cause of action set forth in the complaint? It is often said in jury cases that if there is any evidence to establish the existence of a disputed fact, and a conflict in that regard, the question respecting it is for the jury. That rule should be construed as calling for evidence worthy of belief in regard to the subject. If the truth of the proposition be not within the range of probabilities, in the light of reason and common sense, in view of facts of common knowledge or facts established in the case beyond reasonable controversy, then evidence of the existence of the fact involved does not prove such existence, or tend to prove it. It is not evidence tending to establish the allegation of fact, because there can be no tendency that way so long as all reasonable probabilities are opposed to it. It is often said that if different, unbiased minds may draw different inferences from the evidence, it is for the jury to draw the proper inferences. Just so,—but only within the range of reasonable probabilities. Evidence, or an inference therefrom, showing a bare possibility of the existence of a fact in issue, will not do. Verdicts can be based only on reasonable probabilities. Mere possibility cannot establish probability. *Gibbons v. W. V. R. Co.* 58 Wis. 335; *Finkelston v. C., M. & St. P. R. Co.* 94 Wis. 270. If evidence be not sufficiently persuasive to an unbiased mind, as to the existence of a fact, giving full effect to the most favorable inferences in that regard that can be reason-

ably drawn therefrom, to remove the question of its existence beyond the realms of mere conjecture or possibility, it is the duty of the court, when asked to do so, to pass judgment on the situation and direct the proper verdict and judgment. *Hyer v. Janesville*, 101 Wis. 371; *Cawley v. La Crosse City R. Co.* 101 Wis. 145. In short, before the plaintiff in any case is entitled to have the issues made by the pleadings submitted to the jury, he must do more than merely produce evidence of the facts upon which his cause of action rests. He must produce credible evidence in that regard,—evidence from which sensible men of unbiased minds can reasonably decide the issues in his favor.

The books say, and the rule is, that in determining whether a question is for the jury the trial court should look only to the plaintiff's evidence, because if there be a conflict of evidence between adversaries in a jury case it is for the jury to say where the truth lies. But that does not mean that a trial judge must shut his eyes to undisputed facts, whether established by one party or the other. It means that the evidence of the plaintiff only is to be considered in case of a conflict between that of the defendant and that of the plaintiff where there is room for different reasonable inferences. Where the conflict is between evidence on the one side and some fact established beyond controversy on the other, which fact renders the truth of the evidence on the former so improbable that no reasonably sensible person can believe it, such fact is by no means to be excluded from consideration in determining whether or not there is a question to be passed upon by the jury. On the contrary, the fact is to be considered and held controlling in the case. So the rule really is that, in determining whether or not a question should be sent to the jury, the evidence of the party on whom the burden of the proof rests in regard to it, only, should be considered, in connection however with all facts which are admitted by the pleadings or otherwise estab-

lished beyond dispute in the case. *Badger v. Janesville Cotton Mills*, 95 Wis. 599; *Flaherty v. Harrison*, 98 Wis. 559; *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277; *Cawley v. La Crosse City R. Co.* 101 Wis. 145.

From the foregoing we may deduce the following: If the evidence of plaintiffs in this case, taking the most favorable view it will reasonably bear, including all reasonable inferences therefrom, assuming that it establishes all that it tends to establish when viewed in the light of undisputed facts, would support a verdict in plaintiffs' favor, then the case should have been submitted to the jury for decision, and we should say that the evidence is sufficient for such verdict if, in view of conceded or undisputed facts on plaintiffs' evidence, there is room for unbiased minds to reasonably differ as to where the truth lies, not regarding, in reaching that result, mere conjecture or possibility.

After carefully considering the evidence here in the light of what has been said, we are unable to say that the decision of the trial court is wrong. It is useless to discuss the evidence at length and in detail for the purpose of demonstrating the correctness of our conclusion. That would serve no purpose except to satisfy the learned counsel for appellants that the record has received a thorough examination and that the decision is based on a proper understanding of it. The distinguished counsel are too well known here for us to believe they need such, or any, assurance in that regard, other than the statement of the fact.

We are unable to find any satisfactory evidence in the record that the alleged contract ever had an existence or that any money was ever paid thereon to apply on the Schedule B lands, or that the contingency ever arose which entitled plaintiffs, or those under whom they claim, to demand a deed or damages because of a failure of defendant to make title to such lands. On the contrary, the evidence shows beyond room for reasonable controversy that defendant

never had title to, or could have acquired, the lands under its land grant, which was understood to be the source of its title if title was to come to it at all. The evidence is particularly weak on the claim that defendant received pay for the B lands, the sum of $16,000 or any other sum,—so weak that it cannot be said there was any definite and certain evidence in plaintiffs' favor, looking at the record from the standpoint most favorable to them. It is conceded that if any payment was made it was in May, 1882; that the only person who handled money on that occasion, on account of the purchasers of the land, was D. M. Sabin; that he paid John M. Humbird for his claim on the A and B lands upwards of $30,000; that Sabin and his associates then knew that defendant did not have title to the B lands; and that, if plaintiffs' theory is in accordance with the facts, the B lands, which were not to be conveyed till defendant obtained title thereto, were paid for in full when the contract was made, yet the lands to which defendant then had title were not then paid for either in whole or in part, and nothing was paid thereon till a deed thereof was made in 1883, and then only a small down payment was made, the balance being agreed to be paid one tenth each year thereafter and secured by a mortgage on the land. Why the land, title to which had not been acquired by defendant, was paid for in full, and that to which it had acquired title was paid for in the different manner indicated, is wholly without explanation. That business men would have entered into such a transaction is exceedingly incredible. If plaintiffs' witnesses are to be believed, the B lands were paid for in full in advance of defendant's obtaining title to them and at a time when its officers knew, or ought to have known, the probabilities were all against its claim of title. Not only that, but no claim seems to have been made on defendant, either for title to the lands under the contract or for a return of the money paid thereon, for many years after the transac-

tion referred to took place. Strange as that may seem, it would not of itself sustain the decision of the court in taking the case from the jury, if there was definite evidence that the alleged contract was made and the B lands paid for in May, 1882, as claimed.

The alleged fact of payment rests, as stated, wholly on the evidence of D. M. Sabin, who, after a most searching cross-examination, could not be made to testify that any definite sum of money was paid to defendant at the time of the making of the contract. He could not tell whether, on the occasion referred to, $30,000 or $50,000 or what sum was used, or how much of it was paid to Humbird, or how much to defendant, or whether all was paid to Humbird. He could not produce any check, or receipt, or memorandum, or writing of any kind whatever, to show that the money was paid, to whom or how paid. He merely gave his impressions as to what took place, saying he could not go into details or state definitely anything about the matter. That was in substance the effect of his evidence, and yet it is said there is evidence upon which the jury might have found the existence of a fact as to which the only person concerned with it personally, who testified in regard thereto in plaintiffs' behalf, was unable to say more than: "My impression is that $30,000 was used. My impression is it was $40,000 or $50,000. I cannot tell how much was used or how much Humbird was paid out of it. I cannot say how much of the first payment went to Humbird. I cannot say whether all of the first payment went to Humbird." That is a fair example of Sabin's testimony upon which plaintiffs contend that defendant received $16,000 of the first payment in accordance with plaintiffs' claim. The best that Mr. Sabin could do was to guess at the matter from his recollection of what took place eighteen years before without a memorandum of any kind from which to refresh his memory. Certainly the jury could only have substituted their guess for that of the witness. They

could not have found a verdict by weighing probabilities based on the evidence, for there was no evidence of a sufficiently definite character to raise a probability in plaintiffs' favor. The jury certainly could not have done more under the circumstances than Sabin,— conjecture and guess in regard to the matter. That will not do. Unless there is room within the range of reasonable probabilities for a jury of fair, unbiased men to say they are satisfied from the evidence, to a reasonable certainty, of the existence of facts requisite to a recovery, rules of law and not the finding of a jury must control the situation. *Cawley v. La Crosse City R. Co.* 101 Wis. 145. That gives full effect to the rule that where the evidence will admit of more than one reasonable inference it is for the jury to say which is in accordance with the truth.

There were some exceptions preserved, to rulings on the admission and rejection of evidence, but whether such rulings were right or wrong it is considered could not have changed the result. The case stands substantially without any definite evidence as to any money having been paid to defendant on the B lands. That of itself was sufficient to defeat a recovery, and is sufficient to sustain the ruling of the trial court in directing a verdict for defendant.

By the Court.— The judgment of the circuit court is affirmed.

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WILLOW RIVER LUMBER COMPANY, Respondent, vs. LUGER FURNITURE COMPANY, Appellant.

March 18—April 4, 1899.

Debtor and creditor: Note of third person as payment: Burden of proof: Protest: Parol evidence.

1. Acceptance by a creditor of the note of a third person does not constitute payment of the debt unless expressly so agreed; and the burden of proving such an agreement is upon the debtor.

2. The holder of a note is not required to protest it for nonpayment in order to charge an indorser, timely presentation and demand of payment, and notice to the indorser, being sufficient.
3. Evidence that the general manager of a corporation, after the receipt from its debtor of a note made by a third person and indorsed by the debtor, saw the secretary of the latter and informed him that the note had been received and that he would keep it and if collected would credit the amount and if not would return it, to which proposition the secretary assented, is not objectionable, upon the issue as to whether or not the note was accepted in payment of the debt, on the ground that it contradicts the legal import of the debtor's indorsement.

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Affirmed.*

Plaintiff sold defendant a car load of lumber, amounting to $238.36, on sixty days' time. Soon after the account became due, defendant sent plaintiff a note of one G. A. Dols for $209.86, and a draft to balance the account. The note was held by plaintiff until it became due, but the maker failed to pay it. Thereupon plaintiff returned the note and brought suit for the balance due. Defendant answered, setting up the delivery and acceptance of the note in full payment of the account. The case was tried by the court without a jury. The court found the facts as stated, and that the note was not taken by plaintiff, or accepted by it, as payment of the balance due upon the account, and that plaintiff was not guilty of laches in presenting the note for payment, or in notifying defendant of the maker's default. Judgment was ordered for plaintiff for the balance due, with interest, which judgment the defendant seeks to review on this appeal.

S. N. Hawkins, for the appellant.

W. F. McNally, for the respondent.

BARDEEN, J. Upon the question of fact as to whether the findings are supported by the evidence, we have no hesitancy

in saying that they are so supported. Indeed, it is difficult to see how the trial court could have come to any other conclusion than he did. The burden of proving that the note was received as *payment* of the account was upon the defendant. *Ford v. Mitchell*, 15 Wis. 304. This burden it failed to sustain, and the court very properly found for the plaintiff. As long ago as 1862 this court became committed to the principle that the acceptance by the creditor of the note of the debtor or of a third person for a precedent debt was no payment, unless it was expressly so agreed. The acceptance merely suspended the remedy during its currency, and after the expiration of the credit an action might be maintained upon the original consideration, upon producing the note at the trial for redelivery or cancellation. *Ford v. Mitchell*, 15 Wis. 304. This case has been followed in many subsequent cases, so that the principle may be said to be fairly well settled. *Paine v. Voorhees*, 26 Wis. 522; *Matteson v. Ellsworth*, 33 Wis. 488; *Aultman & Co. v. Jett*, 42 Wis. 488; *Hœflinger v. Wells*, 47 Wis. 628; *Marschuetz v. Wright*, 50 Wis. 175; *First Nat. Bank v. Case*, 63 Wis. 504; *Allis v. Meadow Spring D. Co.* 67 Wis. 16; *Nash v. Meggett*, 89 Wis. 486; *Kinne v. Mich. M. L. Ins. Co.* 92 Wis. 335. With this array of decisions in this court, we hardly feel warranted in cutting loose from the rule in deference to the authority cited by defendant's counsel, 1 Wait, Act. & Def. 569.

Counsel contends that, because the plaintiff failed to *protest* the Dols note, it made it its own, and hence cannot recover in this action. We know of no rule of law that requires the holder of the note to protest it for nonpayment. Timely presentation, and demand of payment, and notice to the indorser, are all that the law requires. *Sumner v. Bowen*, 2 Wis. 524. This the court substantially finds was done. In view of this fact, the defendant has no reasonable ground for complaint.

The plaintiff was permitted to prove that, shortly after

the receipt by plaintiff of the note in question, its general manager saw defendant's secretary, and informed him that the note had been received, that plaintiff would keep the same, and if collected would credit the amount, and if not would return it, to which proposition the secretary assented. Defendant now insists that this testimony contradicts the legal import of defendant's indorsement on the note, and was therefore incompetent to be considered. As we view it, the testimony has no such tendency. It merely relates to the circumstances under which the plaintiff was willing to accept the note, and not to defendant's liability thereon. Upon due consideration of the finding as to this understanding, and the further finding that plaintiff was reasonably diligent in presenting the note and notifying the defendant, we see no reason for disturbing the judgment.

By the Court.—The judgment of the circuit court is affirmed.

O'MALLEY, Administrator, Appellant, vs. O'MALLEY, Respondent.

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115

639
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March 18—April 4, 1899.

Estates of decedents: Setting aside conveyance: Fraud.

An administrator cannot maintain an action under sec. 3832, Stats. 1898, to set aside a deed of his decedent on the ground that it was made with intent to defraud creditors, except for intent to defraud the existing creditors, who alone are represented by him.

APPEAL from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Action by an administrator, whose decedent died in 1894, to set aside a deed of real estate, made in 1875, on the ground that the same was made without consideration and with intent to defraud creditors. Judgment was rendered for the defendant, and the plaintiff appealed.

The cause was submitted for the appellant on the b of *G. Stevens*, and for the respondent on a brief by *Her Grotophorst.*

For the respondent it was argued, among other thi that the action could not be maintained because it is shown that the debt, the collection of which the appe is trying to enforce, existed or was anticipated at the of the execution of the deed. In order to set aside a vo tary conveyance as to subsequent creditors, it is neces not only that actual fraud be shown, but it is also neces to show a specific intent to defraud the individual su quent creditor complaining. *Wheeler v. Single*, 62 Wis. *Wheeler & W. Mfg. Co. v. Monahan*, 63 Wis. 198; *Co Brown*, 114 Mich. 396; *Springer v. Bigford*, 160 Ill. *Brundage v. Cheneworth*, 101 Iowa, 256; *Schreyer v.* 134 U. S. 405; *Neuberger v. Keim*, 134 N. Y. 35; *Ful ton v. N. W. I. & B. Asso.* 48 Minn. 490; *Second Nat.* v. *Merrill*, 81 Wis. 142.

Dodge, J. No discussion of the evidence can be usef this case. There is abundant support for the findings the deceased, in 1875, executed and delivered to the resp ent the deed in question, which was promptly reco None of the debts now existing against the estate we existence or in contemplation at that time, nor, indeed many years afterward. There can be no right in the ministrator, under sec. 3832, Stats. 1898, to attack such veyance except for intent to defraud the existing credi who alone are represented by him. It is wholly immat whether that deed was made upon sufficient, or any, co eration, or with intent to defraud the holder of some existing in 1875. Judgment was properly entered in f of the defendant, and should be affirmed.

By the Court.— Judgment affirmed.

GAY, Assignee, Respondent, vs. D. M. OSBORNE & COMPANY, Appellant.

102 641
a106 660
102 641
f108 47

102 641
111 1245
111 1246

102 641
116 2422

March 20 — April 4, 1899.

Agency: Conversion: Settlement: Fraud: Rescission in part: Restoration of party to former situation.

1. An agent, employed to sell goods on commission for a stated period, at the end thereof pretended to exhibit and account for all unsold goods, thereby showing a considerable shortage in his accounts, representing, apparently, property sold and the proceeds converted by such agent to his own use, and then gave a note and mortgage to his principal for a part of such shortage. The principal thereafter discovered other unsold goods in the possession or under the control of the agent, of less value than the balance of the shortage in excess of the note and mortgage, and subsequently enforced such mortgage, but did no other act in ratification of the settlement. *Held*, that the principal might rescind the settlement as to the goods discovered after it was made, and reclaim such goods.

2. If a person purchase or obtain goods of another by fraud, paying a part of the agreed consideration therefor, and thereafter part with a portion of such goods to a *bona fide* purchaser, such other, upon discovering the fraud, may affirm the transaction *in toto* as to the property beyond his reach, and rescind it *in toto* as to all goods in the hands of his vendee not subject to the *bona fide* claim of any one else, and reclaim such goods without returning or offering to return what was by him received upon the transaction if it was not sufficient to more than pay for the goods not so reclaimed. The doctrine that in order to avoid a sale of property induced by fraud it is requisite that the defrauding party be completely restored to his former situation, and that any act of the defrauded party after discovering the fraud, recognizing the validity of the transaction, constitutes an irrevocable election to ratify it, is not without exception, notably, that when the transaction is separable, without injustice to the wrongdoer, in accordance with the situation of the property as regards being part subject to reclamation by the vendor by reason of being under his control, and the other not, by reason of its having been transferred to innocent third parties, the election will be construed as affecting the latter part only if that can reasonably be done, as where the act recog-

nizing the validity of the transaction merely consists in retain
payment or enforcing payment for goods sold to innocent th
parties.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Da
county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

The appeal is from a judgment in plaintiff's favor in
action to recover the value of a quantity of binding tw
alleged to be the property of plaintiff and to have be
wrongfully converted by defendant to its own use. T
undisputed facts are that from April 15, 1897, to October
1897, J. W. Dowling was agent for the defendant under
written contract to receive, care for, sell, and account for,
goods in Madison, Wisconsin, and that vicinity. The agen
contract required Dowling at the termination thereof to tu
over to the defendant all unsold goods. During the ex
ence of the agency, Dowling shipped some binding twi
the property in question, to one Voss, a subagent for defe
ant at Marxville, Wisconsin, where it was held as defendar
property down to the time of the seizure thereof by defe
ant hereafter mentioned, unless the title thereto passed
plaintiff by reason of the following facts:

Soon after the termination of the agency contract Dowli
and defendant, by its authorized agent, had an accounti
at which all property of defendant that had come to Do
ling's possession under the contract was charged to him, a
all then in the warehouse at Madison, supposed to inclu
all unsold property, was credited to him, and the other cred
to which he was entitled were likewise allowed him, leavi
a balance of property unaccounted for amounting in val
to $1,861.98. Dowling did not disclose the fact that t
binding twine was at Marxville, undisposed of. It was the
fore included in the apparent shortage of $1,861.98, defe
ant having no knowledge but that Dowling had sold t
same till shortly before it took possession thereof as here

after mentioned. November 22, 1897, Dowling gave defendant a note for $1,000 secured by a chattel mortgage to apply on the $1,861.98. Thereafter defendant discovered the facts in regard to the binding twine. A few days thereafter defendant foreclosed its chattel mortgage, realizing $269.25.

Thereafter Dowling duly made an assignment of all his property to plaintiff for the benefit of his creditors, whereby plaintiff became the owner of the binding twine if Dowling was such owner. Thereafter defendant took possession of the twine claiming the same as its property. After such seizure, plaintiff commenced this action to recover the value of the twine upon the ground that it belonged to him as assignee of Dowling, and was wrongfully taken and converted by defendant.

The court held that the accounting between Dowling and defendant, the giving of the chattel mortgage, and the enforcement of it with knowledge of the facts, constituted an election by defendant to hold Dowling as a debtor for the binding twine, whereby the title thereto passed to him, and that plaintiff was entitled to recover the value thereof as assignee of Dowling, such value being $123.61, with interest and costs. Judgment was rendered accordingly.

For the appellant there were briefs by *F. J. & C. F. Lamb*, and oral argument by *F. J. Lamb*.

Frank M. Wootton, for the respondent, to the point that the relation of debtor and creditor having been once established, the appellant is bound by it, and the title to the twine passed to Mr. Dowling, cited *Morris v. Rexford*, 18 N. Y. 552; *Strong v. Strong*, 102 N. Y. 69; *Moller v. Tuska*, 87 N. Y. 166; *Mills v. Parkhurst*, 126 N. Y. 89; *Kaehler v. Dobberpuhl*, 60 Wis. 256; *Crook v. First Nat. Bank*, 83 Wis. 31; *Warren v. Landry*, 74 Wis. 144; *Franey v. Wauwatosa P. Co.* 99 Wis. 40; *Wirth v. Bartell*, 89 Wis. 594; *Moline P. Co. v. Rodgers*, 53 Kan. 743; *Boots v. Ferguson*, 46 Hun, 129; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353.

MARSHALL, J. There is no dispute as to the facts i
case. They were agreed upon between the parties, an
findings of the trial court are in substance in accor
therewith. The question presented is one of law and
be stated as follows: If an agent, appointed for a fixed p
to receive and sell merchandise for his principal and d
to the latter at the end of such period all goods left an
for those sold, at the time of adjusting his accounts a
end of the period pretends to produce and exhibit all
unsold, resulting in an apparent shortage in his acc
representing a large amount of goods which should
hand but are not, indicating a disposition thereof and
tion or use of the proceeds by such agent, and subsequ
the principal takes a note with security for a portion
shortage and thereafter discovers that such agent had
erty of the principal in a neighboring town in care of
agent, of less value than the balance of goods unacco
for in excess of the note and mortgage, and with know
of the facts in that regard the principal forecloses his
gage, is he precluded thereby from reclaiming the goo
discovered after the adjustment of the accounts?

The theory of the appellant in this case is that, if a
ing the accounts with Dowling to determine what
should be accounted for, and taking the note and mort
constituted an election to treat the value of those
counted for as an indebtedness, such election being ma
the supposition that all unsold goods had been honestl
closed, when the contrary appeared defendant was en
to rescind it; and that, the property discovered after th
tlement being of less value than the balance of the sho
in excess of the note and mortgage, the enforcement of
mortgage did not preclude the principal from claiming
property. The theory of respondent, which seems to
been also the one adopted by the trial court, is that defe
could not claim the goods discovered after the settle

without totally rescinding such settlement; that it was a necessary prerequisite to such claim that the defendant should have returned the note and mortgage and restored the agent to the situation existing prior to the settlement, and that the enforcement of the mortgage with knowledge of the facts not only disabled defendant from rescinding the settlement, but constituted a distinct ratification of the acts which gave the agent the status of a debtor for goods unaccounted for instead of a bailee of such goods, thereby transferring the title to the goods to such agent.

The doctrine that an election once made between two inconsistent remedies is binding upon the elector is well understood. It is elementary and has often been applied by this court. *Warren v. Landry*, 74 Wis. 144; *Crook v. First Nat. Bank*, 83 Wis. 31; *Bank of Lodi v. Washburn E. L. & P. Co.* 98 Wis. 547; *Franey v. Wauwatosa P Co.* 99 Wis. 40; *Wirth v. Bartell*, 89 Wis. 594. Also the exception to that doctrine, that an election once made, without negligence, in ignorance of some material fact as to which the opposite party owed the duty of disclosure, may be rescinded within a reasonable time after the discovery of the truth and before any act is done inconsistent with the exercise of that right; and further, the general doctrine that, as a prerequisite to rescission by one person to a contract on the ground of fraud, such person must restore the other party to his original situation; that the rescission must be *in toto*, and that the restoration must be complete as well,—are all familiar. *Grant v. Law*, 29 Wis. 99; *Hyslip v. French*, 52 Wis. 513; *Friend Bros. C. Co. v. Hulbert*, 98 Wis. 183. The governing idea in the authorities is that a person cannot keep the consideration received or retain to himself the advantages of a contract and at the same time repudiate it. So a contract once made or ratified with knowledge of the facts, or one avoided with such knowledge, irrevocably fixes the rights of the parties unless they mutually agree to change

it. "*Electio semel facta non patitur regressum.*" *Mo*
Tuska, 87 N. Y. 166; *Pence v. Langdon*, 99 U. S. 578.

To the foregoing doctrine there is a well-recogniz
ception in many jurisdictions, including this state, that
part payment has been made on a sale contract coveri
rious articles of merchandise, the vendor may rescin
sale for fraud as to a part of the property and recl
without returning the amount paid on the contract
value of the goods reclaimed does not exceed the ba
due upon the entire transaction. *Friend Bros. C.*
Hulbert, 98 Wis. 183. There the facts were that B
& Katzky, by false representations as to their fin
situation, induced plaintiff to sell and deliver to the
credit a large amount of merchandise. Subsequentl
vendees paid a considerable amount upon their pur
Later plaintiff discovered the truth as to the vendees'
cial ability, and thereupon, without returning or offer
return the money received, the plaintiff rescinded th
as to the goods not sold by such vendees and then
hands of the sheriff who had levied upon the same for
creditors of the vendees, such goods being less in valu
the balance due the plaintiffs, and then commenced an
of replevin against such sheriff to recover possession o
goods. The court sustained the action, holding tha
plaintiff was entitled to rescind under the circumst
overruling the claim of the defendant that a total resc
of the contract between the vendor and vendee, and
of the money paid upon the purchase of the goods, wa
essary to a reclamation of any portion of them by the v
It was then, and is now, well recognized that the rulin
an innovation, to some extent, on the doctrine that
must be a rescission *in toto* and a return of everythi
value received upon the sale in order to enable a ven
property to reclaim any part of it. The exception
rigorous doctrine requiring total rescission and resto

appears to be required in order to fit situations where otherwise great injustice would be done. Take the case stated. What reason was there in saying that the vendor should return to his insolvent, fraudulent vendee the balance received, when such vendee had parted to innocent persons with more of the subject of the sale than sufficient to cover the entire amount of such payments, as a condition precedent to a reclamation of the goods still within the reach of the vendor? Such a course would have enabled the wrongdoer to make a profit by the rescission and put the person injured in a far worse plight after the rescission than before.

Rules of law are supposed to be consistent with reason and common sense, so when a proposition is put forward which is not so consistent the presumption at once arises that it is wrong, and such presumption is not successfully met and overcome by showing authority in support of it, if, notwithstanding, the unreasonable character of such proposition yet remains. The right of rescission of a contract for fraud, though a legal right, is based on equitable principles. Therefore the requisites of its exercise should go no further than strict compliance which the dictates of good conscience requires. For that reason the exception to the rule of total rescission indicated has become a part of our jurisprudence. In the *Friend Bros. Case* the vendor could not have rescinded the sale for that part of the goods still under the control of the vendees or the person who stood in their place, and insisted on the contract as to the balance, but could, as was held, retain all payments made, applying the same on account of goods that had passed from the vendees' possession to that of innocent parties, such payments not being in excess of the sale price of such goods, and rescind the sale as to all goods still in a situation to be reclaimed. That doctrine is well supported, as shown in the *Friend Bros. Case.* In *Schoonmaker v. Kelly*, 42 Hun, 299, it was held that a vendor need not return to his fraudulent vendee, as a condition of

rescinding a sale, any greater part of the payments ma thereon than sufficient to cover the goods on hand, less th depreciation in value. To the same effect is *Toole v. Fi Nat. Bank*, 34 Neb. 863, where it is said, in substance, th if the fraudulent vendee of goods upon which he has ma partial payments before the discovery of the fraud by h vendor, sell to innocent parties a portion of such goods, su vendor upon discovering the wrong may retain sufficient such payments to cover such portion, tender back to t guilty party the balance, and reclaim the goods still in h possession. Treating of the rights of a vendor in a simil situation, in *Sisson v. Hill*, 18 R. I. 212, where the vend having received certain notes and $50 in cash of his fraud lent vendee, and the latter having parted with some of t property before the wrong was discovered, returned t notes, retained the $50 to apply on the goods that had pass beyond its reach, and replevied the goods still in possessi of the vendee, and the action was sustained, the court he that the general rule requiring a rescission *in toto* or not all is not to be applied, without exception, to an execut sale contract; that it should be applied no further than necessary to give full protection to the wrongdoer; that t law, rightly understood and administered, does not requi such a rigorous application of the old doctrine of rescissi in favor of the guilty party as to necessarily defeat the re edy of his victim. *Schofield v. Shiffer*, 156 Pa. St. 65, is the same effect.

What reason can be assigned why the law should not allo a severance of that part of a sale contract which can sta consistent with strict justice between the parties and whi cannot be rescinded and the former situation restored wit out prejudice to the innocent party to the advantage of t wrongdoers, from that part of the contract as to which t former situation can be completely restored consistent wi full protection to the wrongdoer against loss? None wh

ever, in our judgment. The idea of those holding to the opposite view is that, the contract being entire, the retention of anything paid upon or any advantage under it, must be deemed necessarily to be in part fulfillment of the contract, hence an affirmance of it. The more reasonable view is that what had the semblance of a contract is not, by reason of the fraud, a contract at all, because the minds of the parties never met in regard to it. Therefore if an injured party so elect, and retains the consideration received to the extent of the goods that cannot be reclaimed, as or on account of indemnity for the wrong, the law will treat the contract as separated into two distinct transactions, leaving that part as to which the parties cannot, without prejudice to the rights of one, be restored to their original situation, distinct from that part where such restoration can be made, and apply the rule of total rescission and return of the consideration to that part by itself.

The facts of this case bring it within the principles above discussed. Dowling committed a fraud upon defendant by not disclosing the fact that he had the binding twine on hand in store at Marxville. If defendant intended to treat the actual shortage of the agent, on account of goods not on hand, as an indebtedness, there is no circumstance indicating an intention to go further and to swell the amount by goods in possession of the agent which ought to have been disclosed to the principal and turned over. The purpose was only to include in the shortage the goods which Dowling had actually disposed of and could not therefore restore to the defendant. The note having been taken for a sum less than the shortage after deducting therefrom the value of the binding twine, upon discovering the fraud of the agent in respect to such twine defendant had a right to treat the former recognition of the shortage as an indebtedness not binding in respect to the twine, and at the same time enforce the note and mortgage. That separated the transac-

tion in regard to the settlement into two distinct parts, an accomplished just what would have been accomplished i the first instance but for the wrongful conduct of Dowlin The settlement remained binding between the parties as t all goods actually disposed of by the agent, and was nullifie as to the goods on hand which were fraudulently represente to have been disposed of. That part of the settlement fr from fraud was wholly affirmed. That part tainted wit fraud and which, without prejudice to Dowling, could stan by itself, was wholly disaffirmed. There was no restoratio required as a condition of the disaffirmance, because the no and mortgage were deemed to have been received upon th account for goods that had been actually sold by the agen

The foregoing answers the proposition stated in the ope ing lines of the opinion in the affirmative and contrary t the decision of the trial court, which necessitates a revers of the judgment appealed from.

By the Court.—The judgment is reversed, and the caus remanded with directions to render judgment for the d fendant in accordance with this opinion.

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102 650
106 352

WILCOX, Plaintiff in error, vs. THE STATE, Defendant i error.

March 20—April 4, 1899.

Criminal law: Assault with intent to commit rape: Evidence.

In a prosecution of a father for an assault with intent to commit ra upon his daughter, the fact that there was no evidence of i jury to the person of the prosecutrix, no outcry when help was hand, and no complaint until long afterwards, taken in connecti with her threats against her father, her ill feeling against him manifested on the trial, and the evident desire of the whole fami to get rid of him, is *held* to throw such doubt upon her story th a conviction based upon her uncorroborated evidence will not sustained.

ERROR to review a judgment of the circuit court for Pepin county: E. W. HELMS, Circuit Judge. *Reversed.*

S. G. Gilman, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General,* and oral argument by *R. F. Hamilton,* second assistant attorney general.

BARDEEN, J. The plaintiff in error was tried and found guilty of an assault upon his daughter with intent to commit rape. The only question we need consider is whether the evidence is sufficient to sustain a conviction. The evidence shows a rather low state of morals in defendant's family. The accused was convicted upon the unsupported testimony of the assaulted party. She lived with her parents in the city of Durand, and was sixteen years of age at the time the assault was said to have been committed. It occurred between 3 and 4 o'clock on a bright, sunshiny day in the month of July, 1893. She was alone with her father in the house,—in the kitchen. She says that her father locked one of the doors, darkened the windows, and then took her in his arms, and carried her into the front room, and laid her on the floor. She described his attempt to accomplish his purpose, and then said: "At about that time I heard a rap on the door. He got up, buttoned up his pants, and went to the door. Mr. Nesbit was at the door. He came after the washing my mother was doing." "I remember of hollering once. I hollered 'Oh!' or something of that kind." "Defendant did not, that afternoon, make any further attempt to have anything to do with me. He threatened my life if I told my mother, and said he would whip me." This is substantially all of the testimony tending to show guilt. The assault is positively denied by the accused. Prosecutrix continued to live with her parents. She was married in November, 1896. After her marriage, herself and husband continued to live with her parents until early

in January, 1897. At that time they had some family u
pleasantness, and she made threats that she would "se
her father over the road." Soon after, they moved to a
other house, and the complaint in this action was mad
She first told of this incident over three years and fo
months after it is said to have happened, and after she w
married. At the time Mr. Nesbit came to the door, a
while she claimed to be in the most imminent danger, s
made no outcry and no appeal for protection. If her sta
ment is true, the situation was then most critical and atr
cious. She does not claim to have been so overcome wi
fright or overawed by threats that she was prevented fro
realizing the enormity of the attempt made upon her. S
remained silent, and for more than three years kept silen
and it is only when her father orders her and her husba
to seek a new stopping place that her tongue is loosene
She offers no excuse for her silence,— not even the plausib
one of desiring to shield her father. Under these circu
stances, we do not think this conviction should stand.

There is no rule of law in this state which forbids a ju
to convict of a crime of this kind on the uncorroborated e
dence of the prosecutrix, provided they are satisfied of t
truth of her testimony beyond a reasonable doubt. But t
courts all recognize the danger of convicting on her unco
roborated statements. As has been said, the "accusation
one easily made, hard to be proved, and still harder to
disproved by one ever so innocent." Courts are therefo
reluctant to sustain such convictions, unless the testimo
and surrounding circumstances are quite clear and decisi
of guilt. *State v. Connelly*, 57 Minn. 482. The fact th
there was no evidence of injury to her person, no outc
when help was at hand, no complaint until long afterwar
taken in connection with her threats against her father, h
ill feeling against him as manifested on the trial, and t
evident desire of the whole family to get rid of him, thro

doubt and suspicion upon her story, and render it highly improbable. An accusation so stale and so entirely without corroboration demands the closest scrutiny. So considered, we are quite well satisfied that the crime charged has not been established by that degree of proof required by law.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial. The warden of the state prison will surrender the accused, *Calvin Wilcox*, to the custody of the sheriff of Pepin county, who will keep him in his custody until discharged therefrom according to law.

FRAME and others, Respondents, vs. THORMANN, Appellant.

102 658
108 82
102 658
57 LRA 170n

January 13 — April 25, 1899.

Domicile: Change: Evidence: Probate of will: Jurisdiction: Conflict of laws: Effect of judgment in another state: Legitimacy of children: Marriage and divorce: Statutes: Extra-territorial effect.

1. In a proceeding to probate a will the evidence (stated in the opinion) is *held* to sustain a finding that the testator, formerly a resident of Louisiana, was at the time of his death a resident of and domiciled in this state.
2. In order to effect a change of domicile from one state to another it is only essential that there should be a removal accompanied by an intention to make the new abode a permanent residence or home; and the fact that there was an intention to return to the former domicile at some future indefinite time would not prevent the change from taking effect.
3. An order or judgment of a Louisiana court appointing an administrator of the estate or succession of a deceased person, though based on a petition alleging that the deceased died while a resident of that state and that he left property within the jurisdiction of the court, is not conclusive as to the domicile of the deceased and does not, under sec. 1, art. IV, Const. of U. S. (requiring full faith and credit to be given in each state to the judicial proceedings of every other state), preclude a Wisconsin court from taking jurisdiction of a pro-

ceeding to probate a will of the deceased and administering s
of his estate as was actually located in Wisconsin.

4. So far as the judgment of the Wisconsin court, in such a c
tempted to legitimatize adult children of the testator resi
another state, it was extra-judicial and inoperative.

5. In a proceeding to probate the will of a testator who, at the
his death, was a resident of and domiciled in Wisconsin, i
material whether his children to whom the estate is left ar
mate or illegitimate.

6. The statutes of another state, prohibiting a person who has b
vorced for adultery from remarrying, have no extra-territori
and cannot prevent him from lawfully remarrying in this s

APPEAL from a judgment of the circuit court for Wau
county: JAMES J. DICK, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Carney, Cl*
Walsh, attorneys, and *E. Howard McCaleb*, of counse
oral argument by *F. Clasen* and *Mr. McCaleb*. The
tended, *inter alia*, that the lower court failed to give
faith and credit" to the judgment and judicial proce
of the Louisiana court, in violation of sec. 1, art. IV,
of U. S. That judgment was a decree *in rem* render
a probate court, and as such is binding upon the
Bigelow, Estoppel (1st ed.), 159; *Grignon's Lessee v. A*
How. 338; Black, Judgments, § 868; Freeman, Judgm
§§ 319*b*, 608; *Broderick's Will*, 21 Wall. 509; *Holmes v. C*
R. Co. 9 Fed. Rep. 229; *Florentine v. Barten*, 2 Wal
Seniority in date of the Louisiana judgment entitles it
ority over the Wisconsin judgment. This rule has bee
versally adhered to in construing the "full faith and c
clause of the constitution. *Memphis & C. R. Co. v. Gr*
88 Ala. 572; *Bank of U. S. v. Merchants' Bank*, 7 Gill
Paine v. Schenectady Ins. Co. 11 R. I. 411. In appointin
toinette Thormann administratrix of the succession of J
Fabacher, deceased, the Louisiana court necessarily had
termine: (1) That the city of New Orleans, parish of O
was the proper place to open the succession of Jose

bacher, because "in the parish where the deceased resided, if he had a fixed domicile or residence in the state." Rev. Civ. Code of La. art. 935. (2) That *Antoinette Thormann* was a beneficiary, heir, and next of kin, entitled as such to be appointed administratrix. Rev. Civ. Code of La. art. 1042; *Caujolle v. Ferrié*, 13 Wall. 465. (3) That the deceased died intestate. Rev. Civ. Code of La. art. 886; *Franklin v. Franklin*, 91 Tenn. 119. The succession of Joseph Fabacher in the parish of Orleans was opened as an original and not as an ancillary one. The administratrix was appointed after due advertisements and delays, under a petition, verified by affidavit, alleging that "deceased was domiciled in New Orleans at the time of his death." All the legatees under the alleged Wisconsin will resided in Louisiana at the time, and the decree appointing contestant the administratrix of his succession determined that he was domiciled in New Orleans at the time of his death, and as such is a *final decree*, possessing all the elements of the thing adjudged, and is *res adjudicata* as to the question of domicile. *Holmes v. O. & C. R. Co.* 5 Fed. Rep. 523; Black, Judgments, § 639. Under sec. 905, R. S. of U. S., said judgment must have the same effect given it in the courts of Wisconsin as it has in the courts of Louisiana. In the courts of Louisiana such a decree is conclusive as to the domicile of the deceased, and cannot be questioned except by action of nullity or appeal. *Duson v. Dupré*, 32 La. Ann. 896; *Grevemberg v. Bradford*, 44 La. Ann. 418; *Simmons v. Saul*, 138 U. S. 439; *Garrett v. Boeing*, 68 Fed. Rep. 51, 61.

To effect a change of domicile, a new residence must be acquired so permanently as to exclude an existing intention to return to the old one or to make a domicile elsewhere than at the new place of residence. *Hartford v. Champion*, 58 Conn. 268; *In re Zerega's Will*, 20 N. Y. Supp. 417; *Barkley v. Succession of Steers*, 47 La. Ann. 951. See, also, Jacobs, Domicil, § 151; *De Bonneval v. De Bonneval*, 1

Curteis' Eccl. 856; *Somerville v. Lord Somerville*, 5 Ves.
Hodgson v. De Beauchesne, 12 Moore P. C. 285; *Wh*
Brown, 1 Wall. Jr. 217; *Dutcher v. Dutcher*, 39 Wis.
Hall v. Hall, 25 Wis. 608. Payment of personal taxes
out resistance or protest is good evidence of dom
Mitchell v. U. S. 21 Wall. 350; *Weld v. Boston*, 126
166; *Carey's Appeal*, 75 Pa. St. 201. The purchase
maintenance of a burial place by a person for himsel
family, and his desire of being buried there, has al
been considered strong evidence of domicile. *Successi*
Franklin, 7 La. Ann. 395; *Haldane v. Eckford*, L. R.
631; *Heath v. Samson*, 14 Beav. 441; *Brunel v. Brunel*,
12 Eq. 298; *In re Capdevielle*, 33 L. J. Exch. 306. The
in which a person describes himself in legal documen
proof of intent; and the entries of a party's name an
dress in an hotel register are considered good eviden
tending to show his domicile. *Smith v. Croom*, 7 Fl
Thorndike v. Boston, 1 Met. 242; *Cabot v. Boston*, 12
52; *Cole v. Cheshire*, 1 Gray, 441. The residence of
dren and that of relatives is an important factor in d
mining the question of a person's domicile. *Stevens*
Masson, L. R. 17 Eq. 78; *Haldane v. Eckford*, L. R.
631; *Hodgson v. De Beauchesne*, 12 Moore P. C. 285;
ley v. Hurley, 67 Law T. N. S. 384. The question in
case is not one of political or municipal domicile, but o
domicile of succession. There is a vast and material d
ence between the two. Facts and circumstances w
might be held sufficient to establish a domicile in the
mer might fail altogether in establishing a testamenta
principal domicile. Phillim. Domicile, 17; *Smith v. C*
7 Fla. 81; *Stephenson v. Langston*, 1 Hagg. Con. 379.
act of voting is not conclusive on the question of dom
When questions as to taxation arise, the exercise of suf
may operate as an estoppel, but the vote may have
without right, or it may have been given through mis

on the part of the voter as to his legal rights. *Ellsworth v. Gouldsboro'*, 55 Me. 94; *Lincoln v. Hapgood*, 11 Mass. 350; *Easterly v. Goodwin*, 35 Conn. 279; *Hayes v. Hayes*, 74 Ill. 312; *Mandeville v. Huston*, 15 La. Ann. 281; *Folger v. Slaughter*, 19 La. Ann. 323; *Villere v. Butman*, 23 La. Ann. 515; *Clarke v. Territory*. 1 Wash. Ter. N. S. 68. See, also, *Hewes v. Baxter*, 48 La. Ann. 1303; *White v. Brown*, 1 Wall. Jr. 217; Jacobs, Domicil, § 435, note 5; *Gardner v. Board of Education*, 5 Dak. 259; *East Livermore v. Farmington*, 74 Me. 154. The mere fact of the transfer of the bodily presence from one place to another will not work a change of domicile; and while mere intention is sufficient to retain an original domicile, it is not sufficient to establish a new one, no matter how strong or how solemnly expressed. *White v. Brown*, 1 Wall. Jr. 217; *Mitchell v. U. S.* 21 Wall. 350; *Hayes v. Hayes*, 74 Ill. 312; *High, Appellant*, 2 Doug. (Mich.), 515; *Jennison v. Hapgood*, 10 Pick. 77; *Bell v. Kennedy*, L. R. 1 S. & D. App. 307; *Collier v. Rivaz*, 2 Curteis' Eccl. 855; *Brown v. Smith*, 15 Beav. 444; *Forbes v. Forbes*, Kay, 341; *Waller v. Lee*, 8 La. 213; *Nelson v. Botts*, 16 La. 596.

For the proponent there was a brief by *Ryan & Merton* and *Chas. F. Buck*, and oral argument by *T. E. Ryan* and *Mr. Buck*.

D. S. Tullar, guardian *ad litem* for certain minors.

CASSODAY, C. J. Joseph Fabacher died March 3, 1897, at Touro Infirmary, in New Orleans, leaving a paper writing, purporting to be his last will and testament, bearing date October 29, 1896, and executed at Waukesha, Wisconsin, and which writing (omitting the formal parts) is to the effect (1) that the testator directed all his just debts, funeral expenses, and expenses of administration to be paid out of his personal estate; (2) that he donated and bequeathed to his beloved wife, Magdalena, the income of $20,000 of four per cent. New Orleans city bonds, to be paid by his executor

or trustee of his last will and testament, as collected by
upon the express condition that she should continue to live
cohabit with him as his wife and care for him in health
sickness until his death, otherwise that she should take n
ing thereunder; (3) that he thereby willed and bequea
unto his brother Johannes, of Havre, France, an annuit
$200 to be paid to him each year so long as he should live,
at his death the further sum of $100 to provide for his fur
expenses; (4) that all the rest, residue, and remainder o
property, both real and personal, wheresoever situated
thereby gave, devised, and bequeathed to his ten child
to wit, Joseph H., Albert, Anthony, Louis, Peter, John
Barbara, Alois, *Magdalena*, and *Jacob A.*, share and s
alike, to each one tenth part thereof, to have and to hol
their own forever; (5) that upon the death of his said
Magdalena, or upon the violation of the provision for
contained therein by reason of nonperformance on her
of the condition thereof, he thereby willed, devised, and
queathed said $20,000 of four per cent. New Orleans
bonds to his said ten children, share and share alike, to
one tenth part thereof; (6) that he thereby nominated and
pointed *Andrew J. Frame*, of Waukesha, Wisconsin, as
executor and trustee of his said last will and testament.

Upon the death of Joseph Fabacher such last will
testament was presented by such executor to the co
court of Waukesha county, for probate, March 27, 1
and that court on the same day fixed the time for the h
ing thereof May 4, 1897, and thereupon caused notice the
to be given. Upon the hearing thereof May 4, 1897,
contestant and the appellant herein, *Antoinette Thorm*
appeared by her attorney, and represented that she w
daughter and sole heir at law of said deceased, and obje
to the probate of said instrument upon the grounds (1)
the deceased was formerly married to one Maria Anna
May 13, 1850, at New Orleans; that the issues of said

riage were two children, viz., *Antoinette*, the contestant herein, and Andreas, who died, about 1887, unmarried and without issue; that said deceased and his said wife Maria Anna lived and cohabited together as husband and wife from the date of their marriage up to 1864, at which time he, the deceased, deserted and abandoned his said wife, Maria Anna, and went to live in concubinage with Magdalena Frey, a sister of his said wife, and continued so to live until about January, 1874; that January 12, 1874, his said wife, Maria Anna, instituted an action for divorce on the ground of adultery, and that a decree to that effect was granted therein to Maria Anna January 27, 1874, by the Fifth district court of the parish of Orleans; that thereafter said deceased in form married Magdalena Frey at New Orleans; that the deceased had eleven children by Magdalena Frey, all of whom were illegitimate, and ten of whom are named in the will, three of whom were born after such supposed marriage, and eight of whom, including Lawrence, not named in will, were born before such supposed marriage; that at the time of the death of Joseph Fabacher, deceased, he was domiciled in New Orleans, Louisiana, and an inhabitant and resident thereof; that the county court of Waukesha county had no jurisdiction of such probate, nor in the settlement or distribution of the estate of the deceased; (2) that any attempt on the part of Joseph Fabacher, deceased, to acquire or create a fictitious domicile, inhabitancy, or residence in Waukesha, Wisconsin, was made with a fraudulent purpose and intent of depriving the contestant, *Antoinette Thormann*, of her legitimate and hereditary rights, as the sole heir at law of the deceased under the statutes of descent of Louisiana; (3) that the execution of such will was procured by undue influence exercised over the deceased, and particularly by Magdalena Frey, the alleged widow of the deceased; (4) that the will was not duly executed by Joseph Fabacher in the manner and form required by law.

On August 17, 1897, such paper writing was admit
probate by the county court of Waukesha county.
upon the contestant appealed from such judgment
county court so admitting the will to probate to the
court for Waukesha county.

Subsequently the cause was tried by the circuit co
Waukesha county and a jury, and at the close of th
the jury returned their verdict upon the questions sub
to them, and to the effect (1) that the paper writin
sented for proof, allowance, and probate as the last w
testament of Joseph Fabacher, deceased, was execu
conformity with the provisions of the statutes of Wis
relating to wills; (2) that the alleged last will and
ment of Joseph Fabacher, deceased, was his own vol
act and deed; (3) that the domicile of Joseph Fabac
the time of his death, March 3, 1897, was at the
Waukesha, county of Waukesha, and state of Wiscon

Thereupon the circuit court found, as matters of f
effect, (1) that the deceased duly made and executed,
for his last will and testament, the proposed will offe
probate, and did duly make, execute, and acknowled
same to be his last will and testament October 29, 1
Waukesha, in Wisconsin; (2) that the deceased so ex
such will of his own free will and accord, without
fluence being brought to bear upon him whatever, an
he was not under undue influence at the time of the n
and subscribing of such will, and that in the exe
thereof he had duly complied with all the requireme
the statutes of Wisconsin; (3) that at the time of the
ing of such will, and at the time of the death of t
ceased, said Joseph Fabacher was a resident and inha
and his domicile was at the city of Waukesha, in Wisc
that June 20, 1895, said testator, in his lifetime, d
quired a domicile and residence in, and then and the
came an inhabitant of, Waukesha, in Waukesha c

Wisconsin; that such residence and domicile continued uninterruptedly from June 20, 1895, down to and including March 3, 1897, the date of his death; (4) that at and prior to the making and execution of said last will and testament the deceased was of sound mind and memory, and competent to make a will; (5) that September 30, 1895, said testator, Joseph Fabacher, in his lifetime, and while so domiciled at Waukesha, was duly and legally married at the city of Milwaukee, in Wisconsin, to said Magdalena Frey, who survives him as his widow; that the issue of said Joseph Fabacher and Magdalena Frey were eleven children, to wit, Joseph H., Albert, Lawrence, Anthony, Louis, Peter, John J., Barbara, Alois, *Magdalena*, and *Jacob*, all of whom were born prior to said marriage of September 30, 1895, and all of whom were by their said father, Joseph Fabacher, in his lifetime, and subsequently to the said marriage, duly and severally recognized by him as his children and offspring, and that all of said children were at the time of his death, and now are, heirs at law of said Joseph Fabacher, deceased; (6) that the contestant herein *Antoinette Thormann*, is a child and heir at law of said Joseph Fabacher, deceased, by such former marriage with Maria Anna; (7) that in said will the testator did not mention his son Lawrence as a beneficiary or legatee, nor did he mention his daughter *Antoinette Thormann*, but that such omission was not by mistake or inadvertence on the part of the testator.

And as conclusions of law the circuit court found (1) that the domicile of the testator, Joseph Fabacher, at the time of his death, March 3, 1897, was at the city of Waukesha, in Wisconsin; (2) that said testator left him surviving his widow, Magdalena Fabacher, and the twelve children mentioned, as his next of kin and heirs at law, all of whom were of full age, except *Magdalena* and *Jacob*, and that all of said children were the legitimate and duly legitimatized children of said Joseph Fabacher, deceased, under and by virtue of

the laws of Wisconsin; (3) that the will of Joseph Fabac
deceased, was entitled to probate in the county of Wauke
and state of Wisconsin as the last will and testament of
deceased, and the same was thereby admitted to probat
the last will and testament of said deceased; (4) that ju
ment should be entered admitting to probate the will of
deceased, and affirming the judgment of the county c
admitting the same to probate, and that the records
proceedings therein should be transmitted to the cou
court of Waukesha county for further proceedings acc
ing to law; that the proponent's costs and attorney's
and the fees of the guardian *ad litem* in the circuit c
should be paid out of the estate of the deceased; and ju
ment was thereupon ordered to be entered in accorda
with such findings.

From the judgment so entered the contestant appeals.

Upon the argument in this court the counsel for the
testant frankly conceded that the question whether the
was executed in the manner and form required by the s
utes of this state, and the question whether such execu
had been procured by undue influence, had, as a result of
trial, both been eliminated from the case. It is also
ceded that this leaves but three grounds upon which cou
seek to reverse the judgment on this appeal. One is
the preponderance of the evidence shows that the testa
was an inhabitant of, and domiciled in, New Orleans at
time of his death.

1. This contention is based upon the concession that u
about June 20, 1895, he was domiciled in New Orleans;
hence that the burden was on the proponent to prove
he had completely abandoned his residence and domicil
New Orleans, without any intention of returning, and
settled permanently in Waukesha. As evidence in supp
of such contention, counsel refer to the fact that he was
sessed in New Orleans on household goods and furni

exceeding $500 in value in each of the years 1895 and 1896, and that the same were paid; that he was not assessed in Waukesha until June 26, 1896; that he had purchased $50,000 of New Orleans city bonds, presumably in 1894 or 1895, which were kept at the Waukesha National Bank; that he had kept an account at the New Orleans National Bank, in which he had deposited from May 6, 1896, to January 7, 1897, in the aggregate, $15,536.34, against which he had at various times drawn checks to nearly the same amount; that May 12, 1896, he deposited in the Waukesha bank $1,150, and that he then had on deposit in that bank a balance of $868.17, making in all $2,018.17, against which checks had been drawn, so that January 7, 1897, he only had a balance to his credit in that bank of $81.56; that in the summer and autumn of 1896 he manifested solicitude for the care of a family tomb he had erected seven years before in New Orleans, and made arrangements to have it repaired and fixed up, and expressed a desire to be buried there; that a short time prior to June 20, 1895, he had executed conveyances describing himself as of New Orleans; that in December, 1895, and May, 1896, he registered at an hotel in Chicago as of New Orleans; that his children remained in New Orleans, and were members of the church there; that when summoned as a juryman in New Orleans on January 6, 1897, he excused himself on the ground that he was seventy-two years of age; and that during 1895 and 1896 he made many conflicting oral declarations concerning his home and his intentions in reference to the same.

On the other hand, there is evidence tending to prove that for several years prior to 1895 the testator, with his family and minor children, had been in the habit of spending his summers in Waukesha, and the balance of his time at New Orleans; that in the fall of 1893 he purchased a fine lot in Waukesha, and commenced the erection of a dwelling house thereon, which was completed in the spring of 1894,

and which was furnished and occupied by him and his
ily thereafter until his death; that prior to 1895 he w
owner of a substantial homestead in New Orleans, tog
with other real estate; that in the fall of 1894 and s
of 1895, with the exception of his tomb or cemetery l
sold all of his property in that city, including his homes
that, when asked by his neighbors and friends and bu
associates at New Orleans why he was disposing of his
erty, he told them substantially the same thing, that h
not going to live any longer in New Orleans, that h
going to Waukesha to make his home, and that was
he was disposing of his property; that such statements
not volunteered, but were simply made in response
quiries by friends and business associates; that when he
to Waukesha he told all whom he had occasion to spe
upon that subject in connection with any act perfo
there that Waukesha was his home, that he had sol
home in New Orleans, and no longer claimed or had
home there; that in the spring of 1895 he came wit
family, including his two minor children, to Waukesha
brought with him his horses and carriage, and also his b
mortgages, and evidences of debt, and deposited the
in a safety-deposit vault, in which he rented a box, i
Waukesha National Bank, and that they remained in
bank up to the time of his death; that he procured a
for himself and family in St. Joseph's Catholic Chur
Waukesha, and surrendered the seat in the church
they were formerly accustomed to occupy in New Orl
that he claimed that the climate and waters of Wau
were better for his health than in Louisiana; that h
vided himself with a fur coat, fur cap, arctic shoes
clothing which would make him comfortable in the W
sin climate in winter; that as his marriage to Magd
Frey on July 24, 1874, in Louisiana, was void unde
laws of that state, he was remarried to her in Milw

September 30, 1895,—a little over three months after he so became a resident of Waukesha, and described himself in the certificate of marriage as a resident of Waukesha; that in the fall of 1896 he appeared before the board of registration in Waukesha, and caused himself to be registered as a voter in the Second ward of the city of Waukesha, in which he resided and voted at the general election in November, 1896, after being questioned by the board of registration and the inspectors of the election; that October 29, 1896, he executed the will in question, describing himself therein as of Waukesha, Wisconsin, and therein nominated and appointed the plaintiff herein, *Andrew J. Frame*, who was at the time president of the bank in which such bonds, mortgages, and evidences of debt were deposited, as sole executor and trustee of such will; that after he so became a resident of Waukesha he was in New Orleans during an election for mayor of that city, at which one of his best friends was a candidate, and when requested to vote he absolutely refused to do so, on the ground that he was not a resident of New Orleans and had no right to vote in that city; that his children who were of age were all in business in New Orleans; that his son Lawrence was a man of considerable means, and constructed a house on Calhoun street in that city, and furnished the same, in order that his father and mother might occupy the same when they visited their children in winter; that after the election in November, 1896, the testator was induced by the importunities of his wife and a desire to visit his children to go to New Orleans and occupy the house so constructed by Lawrence for the winter, but with the intention of returning to Waukesha in the spring, and that while there he was taken sick, and died March 3, 1897.

Upon evidence thus briefly outlined the jury found that at the time of the testator's death his domicile was at Waukesha. The court found the same to be the fact, and also

found that the testator acquired a domicile and reside
and became an inhabitant of, Waukesha on June 2
and that such residence and domicile continued unint
edly from that time down to and including the dat
death. Such findings are not only supported by ev
but by the great preponderance of the evidence. T
tator was seventy-two years of age. There is no cla
he was laboring under any disability which prevent
from changing his domicile from New Orleans to Wa
He was manifestly a man of decided notions of his o
with sufficient force of character to carry his purpos
execution. He, in common with all other citizens
country, had a legal right to change his residence fr
state to another whenever he desired. In the langu
the Massachusetts court: "A man has a right to cha
domicile for any reasons satisfactory to himself. In
mining whether there has been such a change from on
to another, the test is to inquire whether he has in
moved his home to the latter place with the intention
ing it his residence permanently or for an indefinit
If he has, he loses his old domicile and acquires a n
with all its rights and incidents; and the law does
quire into the purposes or motives which induced
make such change. It may be because he prefers th
of the new place of domicile, or because he can dimin
taxes and other burdens, or because he desires to brin
in a court which would not otherwise have jurisdictio
status as an inhabitant depends upon the fact that
made a change of his home, and not upon the motives
sons which influenced him to do so." *McConnell v.*
138 Mass. 373, and cases there cited; Jacobs, Domicil

The relationships disclosed by the record and insiste
by the contestant's counsel were well calculated to
late in the testator a desire to change his residence an
cile as he did. In doing so, he was merely exercis

right of an American citizen. To effect the change, it was only essential that such removal should be accompanied by an intention to thereafter make Waukesha his permanent residence or home. *State ex rel. Wood Co. v. Dodge Co.* 56 Wis. 79; *Kempster v. Milwaukee*, 97 Wis. 343; *Hart v. Lindsey*, 17 N. H. 235; *S. C.* 43 Am. Dec. 597; *Ringgold v. Barley*, 5 Md. 186; *S. C.* 59 Am. Dec. 107, and note; *Hairston v. Hairston*, 27 Miss. 704; *S. C.* 61 Am. Dec. 530. Even if there was an intention to return at some future indefinite time, yet that would not have prevented the change from being effectual. *Holmes v. Greene*, 7 Gray, 299; *Sleeper v. Paige*, 15 Gray, 349; *Kempster v. Milwaukee, supra;* Jacobs, Domicil, §§ 159, 171. Most of the testator's children resided in New Orleans, and the mere fact that he went there with his family for the winter, or that he kept a bank account there, or that he had expressed a desire to be finally buried in the tomb which had several years before been constructed at considerable expense, is not inconsistent with such change of domicile from New Orleans to Waukesha.

2. Counsel for the contestant contends that the Waukesha courts were barred from entertaining such jurisdiction and entering such judgment by reason of a former final judgment of the civil district court for the parish of Orleans, Louisiana, in the succession of Joseph Fabacher, rendered and signed April 22, 1897, appointing the contestant administratrix of said estate, and by her acceptance and qualification of such trust. This is based upon duly authenticated documentary records of proceedings in that court, to the effect that the deceased died in New Orleans, March 3, 1897, of strangulation of umbilical hernia; that March 29, 1897, two days after the petition for the probate of the will was presented to the county court of Waukesha county, the contestant made and verified her petition to the judges of such civil district court for the parish of Orleans, representing the death of her father, that at the time of his death

and for many years before he was a "citizen of Lou
domiciled and residing in the city of New Orleans
he left property within that city and within the juris
of that court, that she was the "sole surviving he
legitimate child of said deceased," and praying that
appointed such administratrix, that an inventory
property belonging to the estate be made and the
thereof appraised by appraisers to be appointed fo
purpose, that an attorney for absent heirs be appointe
that the proper notices be given; that such petiti
filed and notice of application and inventory ordere
such appraisers and such attorney were appointed
30, 1897; that such inventory was taken and the con
petitioned the court for the approval of the same A
1897; that such inventory stated that April 5, 189
appraisers visited the residence of said deceased at N
Calhoun street; that they "then and there requeste
Magdalena Frey, known as the widow of Joseph Fa
deceased, to point out" the property and effects of
ceased, that she then and there informed them "t
deceased was not the owner of the furniture, moval
effects contained" therein; and "that the same were
entirely and exclusively by Mr. Lawrence Fabacher;
April 10, 1897, they proceeded to further take an inv
to wit, "one marble tomb in lot situated in St. J
Cemetery No. 2, bearing the inscription, 'Family of
Fabacher,' also two galvanized iron sofas and fiv
valued by said appraisers at the sum of $3,500, and
being nothing further to be included in this inve
they then closed the same; that April 22, 1897, such
tory was by such court duly "approved and homol
as prayed for and according to law;" that on the sa
of such approval that court made an order reciting t
and public notice having been given of such applicat
cording to law, and no opposition having been filed t

and the time for opposing the same having elapsed, the court "ordered that said *Antoinette Thormann*, wife of Charles W. Thormann, be appointed administratrix of this succession, and that letters, as such, issue to her on her complying with the requisites of the law. Judgment rendered and signed April 22, 1897. FRED D. KING, Judge. A true copy. F. E. Peterson, Dy. Clk.;" that thereupon, and on April 30, 1897, that same court appointed the contestant, "*Mrs. Antoinette Thormann* (born Fabacher)," as "administratrix of the said succession of Joseph Fabacher," and stated therein that she had fulfilled all the requisites of the law.

The courts of Wisconsin are, of course, bound to give full faith and credit to the public acts, records, and judicial proceedings in Louisiana, as well as every other state in the Union. Const. of U. S. art. IV, sec. 1. This court has gone so far as to sanction the disallowance of a claim against an estate by the probate court of another state on the ground that such claim had been barred by the statutes of limitation of such state. *Sanborn v. Perry*, 86 Wis. 361. To a similar effect: *Griggs v. Becker*, 87 Wis. 313; *Parker v. Stoughton M. Co.* 91 Wis. 174, 181. So it has gone so far as to hold that where a resident of Wisconsin, owning lands in other states, makes a will disposing of all his property, the validity of the will, so far as such lands were concerned, must be left to the courts of the states, respectively, where such lands were situated. *Ford v. Ford*, 70 Wis. 19; *S. C.* 72 Wis. 621. In that case it was held, as the settled doctrine, supported by numerous adjudications, that the validity of every disposition of real estate by will must be governed by the law of the place where the land is situated, and that the validity of every disposition of personal property by will must be governed by the law of the testator's domicile at the time of his death. 70 Wis. 44, 45. It was also held in that case that where such will directed the personal assets to be invested in lands in another state the validity of such

investments must be left to the courts of such oth
Such rules were followed in such other states. *Ford*
80 Mich. 42; *Robertson v. Pickrell*, 109 U. S. 608.

These cases are cited to show that it has been an
settled purpose of this court to give full faith and c
the public acts, records, and judicial proceedings c
states. But to entitle a judgment in a court of anoth
to such full faith and credit in an action or proceeding
like the case at bar, it must appear from the record
that the court rendering the same had jurisdiction
subject matter of the action or proceeding. *Rose v.*
4 Cranch, 241; *Christmas v. Russell*, 5 Wall. 290; *G*
Page, 18 Wall. 350; *Thompson v. Whitman*, 18 Wa
Hart v. Sansom, 110 U. S. 151; *Guaranty T. & S. I*
G. C. S. & M. R. Co. 139 U. S. 137. Thus it is held
of the cases cited that: "Records and judicial proc
of each state affecting property or estate within it
every other state the force and effect which they po
the state of their origin; but, as to similar property o
situated in another state, they have no greater or oth
than similar records or proceedings in the courts
state." *Robertson v. Pickrell*, 109 U. S. 608.

The record of the Louisiana court, in evidence,
shows that the contestant was, after appropriate p
ings, appointed administratrix of the succession of
ceased, and that the inventory of the estate there pr
consisted of the tomb, etc. There was no attempt
court to adjudicate as to property situated in Wiscon
as to the domicile of the deceased. That court, it
conceded, had jurisdiction as to any tangible prope
ually located in that state. In the *Duchess of Ki*
Case, cited and relied upon by counsel for the contes
was, in effect, determined by the judges, unanimousl
than 120 years ago (1) that the judgment of a court
current jurisdiction, directly upon the point involv

conclusive between the same parties upon the same matter directly in question in another court; (2) that the judgment of a court of *exclusive* jurisdiction directly upon the point involved was, in like manner, conclusive upon the same matter between the same parties coming *incidentally* in question in another court for a different purpose. *Rex v. Duchess of Kingston*, 20 How. State Tr. 538. But even in that case the judges were equally unanimous in stating, as exceptions to those rules, that no judgment "is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment." These exceptions have frequently received the sanction of this and other courts. *Lewis's Appeal*, 67 Pa. St. 165; *Bennett v. Holmes*, 1 Dev. & B. Law, 487; *Caujolle v. Ferrié*, 13 Wall. 469; *Brown v. Brown*, 37 N. H. 537; *Hunter v. Davis*, 19 Ga. 413; *Church v. Chapin*, 35 Vt. 224; *Williams v. Williams*, 63 Wis., 70, 71. In a recent English case it was "held that the decree of the probate court was not conclusive *in rem* as to the domicile, for that it did not appear that the decree was necessarily based on the finding as to domicile." *De Mora v. Concha*, 29 Ch. Div. 268. It was there queried whether the findings on which a judgment *in rem* is based are in all cases conclusive against the world. Certainly there was no adjudication in the Louisiana court which precluded the county court of Waukesha county from taking jurisdiction and admitting the will to probate and administering so much of the estate as was actually located in Wisconsin, and this includes the bonds, mortgages, and evidences of debt deposited in the Waukesha bank, with the president thereof, who is executor of the will.

3. Counsel for the contestant contends that it was error for the court to hold that the eleven children of Joseph Fabacher and Magdalena Frey, all born before their marriage of September 30, 1895, were the legitimatized children of Jo-

seph Fabacher, deceased, under and by virtue of the law
Wisconsin. As indicated, all those children were of age
residents and citizens of Louisiana, except the two mi
children. The question of legitimatizing the children
were such citizens of Louisiana was not properly invol
in determining whether the will should or should not be
mitted to probate. True, the contestant presented that is
and so the trial court determined the same against the
testant. But it was foreign to the probate of the
While the legislature of Wisconsin may properly regul
the status of citizens of this state, we do not understand t
it has any power to prescribe the status of citizens of ot
states. *Cook v. Cook*, 56 Wis. 195, and cases there cited;
Sure v. Lindsfelt, 82 Wis. 351; *State v. Duket*, 90 Wis.
The constitution of this state provides that "all lands wit
the state are declared to be allodial, and feudal tenures
prohibited." Const. art. I, sec. 14. Being a resident of
state and domiciled therein, the testator had the legal ri
under the laws of Wisconsin, to dispose of his property,
and personal, as he pleased, and to whom he pleased, so l
as he infringed no law of this state. He had the legal ri
therefore, to devise and bequeath his property to his c
dren by name, as he did, whether they were legitimate
illegitimate. So far as the judgment in form attempted
legitimatize the adult children who were residing in
citizens of Louisiana, we must hold that it was extra-judi
and inoperative.

4. The testator being a resident and domiciled in W
kesha, as found and determined, we perceive no legal
pediment to the marriage of the testator and Magdal
Frey on September 30, 1895. It appears to be pretty fir
established that a statute of a state, prohibiting a mar
person who has committed adultery and been divor
therefor from remarrying, has no extra-territorial fo
and hence cannot prevent such person from lawfully ren

rying in some other state, although it may subject him to punishment in the former state. *Dickson v. Dickson's Heirs*, 1 Yerg. 110; *S. C.* 24 Am. Dec. 444, 447; *Phillips v. Madrid*, 83 Me. 205; *S. C.* 12 L. R. A. 862; *Fuller's Adm'r v. Fuller*, 40 Ala. 301; *Wilson v. Holt*, 83 Ala. 528. The courts of Louisiana have applied the same rule to such prohibitory statute of the state of New York. *Succession of Hernandez*, 46 La. Ann. 962; *S. C.* 24 L. R. A. 831. The incidental and collateral effect of such marriage on the two minor children, it is unnecessary to consider.

By the Court.— The judgment of the circuit court is affirmed.

BARDEEN, J., took no part.

MAY, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

April 4—April 25, 1899.

Railroads: Killing of animals on track: Notice: Section man: Failure to close gate: Contributory negligence.

1. A notice to a railway company of a claim for the killing of cows through its negligence "in failing to keep the gate in the fence separating the right of way of said railway company from a portion of the farm of W., in said town of Blooming Grove, closed," and in the management of its train "upon and along said right of way," etc., reasonably construed, locates the place of the accident on the right of way through W.'s farm, and is not so indefinite with respect to the place of the accident as to prevent a recovery.
2. Failure of a section man to close a gate which he knew to be open in the fence along that part of the right of way upon which he was employed does not relieve the railway company from liability for the killing of animals belonging to him, which strayed upon the right of way through said gate and were struck by a passing train, unless it be shown that it was his duty to close such gate.

APPEAL from a judgment of the circuit court fo
county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This is an action to recover for the killing of tv
and the serious injury of a third cow owned by the p
which were run over by an engine and train on the
ant's railway. It was alleged that the cows came c
defendant's track through a farm gate in the right
fence, which was negligently left open by the def
The killing and maiming of the cows was admitted
answer, but the other allegations of the complain
denied. Upon the trial, it appeared that the follow
tice of the injury was served on the defendant's ag
cember 7, 1897:

"*To the Chicago & Northwestern Railway Company:*

"You will please take notice that on the 2d day of
1897, two Jersey cows, owned by *James May*, of the
Blooming Grove, Dane county, Wisconsin, were kill
a third Jersey cow belonging to the above-named *M*
injured, through the negligence of the *Chicago &*
western Railway Company in failing to keep the gat
fence separating the right of way of said railway co
from a portion of the farm of John Walterscheit,
town of Blooming Grove, closed, and on account of t
less and negligent management of the said railway co
in running its engine and train upon and along said
way on the said 2d day of August, 1897; and that
damage occasioned by said killing and injury of the
mentioned cattle of said *James May*, the said *Jam*
demands satisfaction, in the sum of $150.

"Dated December 6, 1897. JAMES MAY,

"by OLIN & BUTLER, his A

The evidence showed, without dispute, that the a
happened at a point on the defendant's right of wa
one mile east of the crossing of defendant's track c
track of the Watertown division of the Chicago, Mil

& St. Paul Railway, in the town of Blooming Grove, Dane county, and about three miles from the defendant's station in the city of Madison. It was admitted that the cattle must have strayed upon the right of way through a gate in the right of way fence, which was placed there for the purpose of a farm crossing in the farm of one Walterscheit, through which the defendant's railway runs. It was shown that this gate had been open for weeks. The plaintiff lived on the shore of Lake Monona, about half a mile from this gate, and kept his cows in a yard running down to the lake, and inclosed on three sides by fences, and on the lake side by the lake and a fence running along the edge thereof. The evidence also tended to show that the cattle were left in the inclosure as usual on Sunday night, August 1, 1897, before the accident, and the fence in good condition, and all gates and bars closed, but that during the night they escaped in some manner through the lake side of the inclosure. At about 5 o'clock in the morning of August 2d, the plaintiff's wife discovered that they were gone, and found their tracks coming out of the lake to the east of the inclosure, and traced them along the Cottage Grove road into the premises of Walterscheit. They were run over by the 5 a. m. train, at a point on the right of way about thirteen or fourteen rail lengths (a rail length is thirty feet) east of the Walterscheit gate, and the gate was still open.

The evidence also showed that the plaintiff was then in the defendant's employ as a section hand, and belonged to the crew which had charge of this part of the right of way, and passed this gate daily, and knew that it had been open for weeks. He last saw it open on Saturday before the accident. He testified that on Sunday before the accident he went with the section crew, at 5 o'clock a. m., to Waukesha, and worked all day, returning on a late train that night, and did not see the gate on either trip. Upon cross-examination, he stated that it was not his duty to watch the con-

dition of the fences and gates, or to repair them, directed to do so by the foreman; that it was simpl duty to do the work which he was instructed to do b foreman. It also appeared that the foreman of the knew that this gate had been open for weeks.

At the close of the plaintiff's evidence a nonsuit granted, and the plaintiff appeals.

For the appellant there was a brief by *Olin & Butle* oral argument by *H. L. Butler* and *J. M. Olin.*

For the respondent there was a brief by *Fish, Cary, U & Black*, and oral argument by *John T. Fish.*

WINSLOW, J. The respondent relies upon two propos as justifying the nonsuit: (1) That the notice of the i was insufficient, because indefinite as to the place whe accident occurred; and (2) that it was part of the plai duty to close the gate when he saw it open, and henc the accident was caused by his own neglect of duty.

The court held the notice sufficient, but nonsuite plaintiff upon the second ground.

We think the court was entirely right in holding th tice sufficient. Fairly and reasonably construed, the states that the cattle came upon the track through a g the right of way fence where such right of way runs th the farm of John Walterscheit, in the town of Bloo Grove, in Dane county, and were killed on *said right o* i. e. the right of way through Walterscheit's farm, by r of the negligence of the company in failing to keep the closed and in carelessly running its engine and train. tainly, this seems reasonably definite and certain. company did not know where the farm of John Walter was, it was easily ascertainable. The claim that the of the injury is not definitely stated is entirely too nar construction of language for practical purposes.

On the other hand, we think that the court could no

as matter of law, that it was the duty of the plaintiff to close the gate. There was no evidence tending to show that it was part of a mere section man's duty to close or repair gates or fences, without direction so to do from the foreman of the crew. In fact, all the evidence there was in the case upon the subject was to the contrary. The defendant may, perhaps, be able to show that the plaintiff's duty, in fact, went to this extent, but the evidence does not now show it.

No other considerations are urged in support of the nonsuit.

By the Court.—Judgment reversed, and action remanded for a new trial.

BURMEISTER, Respondent, vs. OLSON, Appellant.

April 4—April 25, 1899.

Appeal: Findings sustained: Mistake.

Findings of the trial court that there was a mistake in the condition of a mortgage, and also in the description of the premises covered by it, are *held* not to be against the preponderance of the evidence in this case, even applying the rule that such mistake must be shown beyond reasonable controversy.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Action to reform a mortgage of real estate. One Weltzin, plaintiff's father-in-law, being indebted to the defendant in about the sum of $1,700, secured by mortgages on certain real estate, and the defendant demanding payment, the plaintiff, Weltzin, and the defendant met and negotiated, as a result of which it was agreed that Weltzin was to give a chattel mortgage on some $300 worth of personal property, and that the plaintiff was to give a mortgage on a certain house and lot of his in the village of Mt. Vernon. Plaintiff

claims that the understanding and agreement was tha mortgage was merely to be conditioned upon Weltzin's ing over the proceeds of the chattel-mortgaged prop which he was authorized to sell and dispose of, and th was intended to cover only the northeast half of lot block 2, of the village of Mt. Vernon; that as a result o negotiation he made a memorandum upon a slip of p reading, "*Olson* will release mortgage when Weltzin over receipts of sale. ½ Lot 4, Block 2;" and that th structions to the attorney were to draw the mortgag cordingly. The memorandum was offered in evidenc confirmation. The mortgage in fact drawn covered the w of lot 4, in block 2, and was conditioned upon the pay of the whole indebtedness of $1,705, which plaintiff clain executed without examining the same, and upon the mu misunderstanding that it was drawn in accordance with arrangement reached. Defendant denies any mistake. other witnesses were called in support of the plaintiff's tention. The court found that the mortgage was so dr by mistake and was intended as claimed by the plaintiff, entered judgment reforming the same, from which def ant appeals.

For the appellant there was a brief by *Ben E. Wait Gerhard M. Dahl*, and oral argument by *Mr. Wait.*

For the respondent there was a brief by *Bird, Roge Bird*, and oral argument by *Geo. W. Bird.*

Dodge, J. After a very careful examination of the dence in this case, we are unable to say that there is a ponderance thereof against the finding of the circuit c that, by mistake and contrary to agreement of the par the mortgage from plaintiff to defendant was conditio upon the payment of the sum of $1,705, instead of b conditioned that said mortgage should cease and be and void, provided the said plaintiff paid or caused to

paid to the said defendant the proceeds of the sale of the personal property mentioned, even applying to the consideration of such evidence the rule that the mistake must be shown beyond reasonable controversy, as announced in *Harter v. Christoph*, 32 Wis. 248, and numerous other cases. The evidence also overwhelmingly supports the finding of a mistake in the description of the mortgaged premises. A discussion of the evidence can ordinarily serve no good purpose when the conclusion of the circuit court therefrom is concurred in. The judgment reforming the mortgage results unavoidably from these findings, and should not be disturbed.

By the Court.—Judgment affirmed.

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Abatement and survival.

1. The liability created by sec. 4255, Stats. 1898, in case of the death of a person by an actionable injury for which such person could have recovered damages if death had not ensued, is for the benefit of certain relatives of the decedent mentioned in sec. 4256, Stats. 1898, and in default of such relatives there is no liability. *Brown v. C. & N. W. R. Co.* 137
2. In an action for damages under said sections, if the complaint fails to show the then existence of relatives entitled to benefit by the recovery, it is fatally defective. *Ibid.*
3. Under sec. 4253, Stats. 1898, actions for injuries to the person survive, though death ensue from the injury. *Ibid.*
4. The right of action for an injury to the person which survives under sec. 4253 is separate and distinct from the loss to surviving relatives recoverable under secs. 4255 and 4256. *Ibid.*
5. If a person die from the effects of an actionable personal injury, not having received satisfaction for his damages, action therefor for the benefit of his estate may be prosecuted to satisfaction after

his death. [Whether such satisfaction in advance of an act under secs. 4255 and 4256, if circumstances exist rendering such ter sections applicable in any event, would be a bar to such acti not decided.] *Il*

6. An action in tort for deceit, to recover general damages caused the fraud, does not survive under sec. 4253, R. S. 1878, which p vides for survival of "actions for damages done to real and p sonal estate." That language relates only to injuries to spec property. *Lane v. Frawley,*

7. Nor does such an action survive under sec. 3252, R. S. 1878, wh provides that "for wrongs done to the property, rights or intere of another, for which an action might be maintained against wrongdoer, an action may be brought by the executors or adm istrators of the person injured, after his death, against such wro doer." That section was not intended to provide for the survi of any action, but merely to regulate the proceedings in such tions as otherwise survive. *Il*

At law or in equity? See EQUITY, 3–7.

8. A proceeding by garnishment to reach nonleviable property or ass is essentially equitable. *Farmers F. Ins. Co. v. Conrad,*

Tort or contract?

9. In an action by executors, a complaint alleging that defendant made false representations whereby plaintiffs' decedent in her l time had been induced to execute a mortgage to defendant, whi through foreclosure by an assignee, resulted in the loss of the pr erty, for the value of which, together with the amount of a d ciency judgment paid by plaintiffs, judgment is demanded, is *h* not to state a cause of action on implied contract, but, if any, in tort for deceit. *Lane v. Frawley,*

For wages or for breach of contract? See LOGS AND TIMBER, 1.

Election between remedies. See CONTRACTS, 4. CORPORATIONS, 4. D AGES, 4. PARTNERSHIP, 5. PLEADING, 2, 3.

10. One who, with full knowledge of the facts, sues to recover mo upon an implied contract as for money had and received ther waives all right to bring a subsequent action on the theory that money was wrongfully converted. *Carroll v. Fethers,*

Consolidation and severance of claims on appeal from county board. TAX TITLES, 5.

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ADVERSE POSSESSION.

1. One who has made a homestead entry of public lands but has completed the purchase does not hold *adversely* to the Uni States or its grantee, within the meaning of sec. 3096, R. S. 1 *Whitcomb v. Provost,*

2. The possession of land by a trustee is the possession of the *cestui trust* and will not, however long continued, ripen into title in trustee. *Ellis v. Southwestern Land Co.*

ADVISORY VERDICT. See PRACTICE, 2.

AGENCY.

See BILLS AND NOTES, 6. CONTRACTS, 3. INSURANCE, 9, 10, 12.

1. In an action against a principal for money borrowed in his name by an agent, there was evidence requiring the submission to the jury of the question whether the agent had actual authority and also whether he had apparent authority. The jury found that he had authority to borrow money, and that the plaintiff believed that he had that authority. *Held*, that the verdict was uncertain as to whether the agent had actual or apparent authority, and therefore would not support a judgment for plaintiff, in the absence of a finding that the plaintiff had reasonable ground on which to base his belief as to the agent's authority. *McDermott v. Jackson*, 419

2. In such a case the better practice would be to submit a question as to each form of authority separately, under proper instructions. *Ibid.*

3. No recovery can be had against a principal on the ground of ratification of his agent's unauthorized act in borrowing money which was used in his business, by reason of his retention of the borrowed money, unless he had a reasonable time after notice of the lender's claim, not only to make inquiry into the facts, but also to return the money. *Ibid.*

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APPEAL AND ERROR.

Writ of error, when lies.

1. A writ of error will lie only after judgment in an action at law, and cannot be used to review judgments in equitable actions. *Farmers F. Ins. Co. v. Conrad*, 387

From what appeal may be taken: "Amount involved."

2. Where the only controverted question is whether a contract for the sale of three carriages was separable, and the plaintiff therefore entitled to recover $85, the contract price of one of them, without delivery of the others, this court obtains no jurisdiction by an appeal unless accompanied by a certificate of the trial judge as provided in sec. 3047, Stats. 1898. *Troy C. Co. v. Bonell*, 424

By whom appeal may be taken: Undertaking, when necessary. See MUNICIPAL CORPORATIONS, 2, 3.

3. An action in the circuit court to enjoin the continuance of a public nuisance, when instituted by a private relator in the name of the state, is not an action brought by the state, and an effective appeal therein cannot be taken by the relator without the giving of an undertaking. *State ex rel. Hartung v. Milwaukee*, 509

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Record: Bill of exceptions. See APPEAL, 5. PRACTICE, 1.

Exceptions: Questions considered: Abandonment of assignment of er

4. Exceptions to the refusal to give instructions requested mus taken on the trial. *Little v. Iron River,*

5. Objections taken before a referee must be renewed before the c on the motion to confirm or to modify or set aside the report, the rulings of the court thereon must be preserved in the bil exceptions; otherwise the rulings of the referee cannot be revie by the supreme court on appeal. *Small v. Prentice,*

6. An objection to garnishment proceedings on the ground that principal defendant had property subject to execution sufficien satisfy the plaintiff's claim cannot be raised for the first tim the supreme court. *N. W. Fuel Co. v. Lee,*

7. An assignment of error not argued will be treated as abandoned less it presents a palpable and obvious error prejudicial to just *Butler v. State,*

Findings of fact: Failure to make.

8. The decision of the trial court, if supported by the evidence, will be reversed for want of findings of fact, especially in a special ceeding. *In re Callahan,*

Questions of fact: Decision when disturbed. See FINDINGS OF FACT

9. The findings of the trial court will not be disturbed on appeal un clearly against the preponderance of the evidence. *Crawfor Christian,*

10. Same point. *Northwestern Fuel Co. v. Lee,*

11. Same point. *Bandell v. Jelleff,*

12. Same point. *Philip Meyer Co. v. Sheboygan Chair Co.*

13. On appeal from a judgment in an action tried by the circuit c without a jury, on exceptions to the findings of fact the evide will be examined in respect to whether it sustains such findi but error is presumed against, and unless clearly shown the d ion of the trial court will not be disturbed. *Menz v. Beebe,*

14. Under the foregoing rule all fair doubts are to be resolved in f of the decision rendered below; and the distance between c preponderance of evidence on one side of a controversy and ponderance on the other is so great that the decision below question of fact is not easily or frequently disturbed. *I*

15. Where the evidence is conflicting fair doubts are to be resolve favor of the conclusions of the trial court, and its findings not be disturbed unless against the clear preponderance of the dence. *Jarvis v. N. W. Mut. Relief Asso.*

Affirmance and reversal: Material and immaterial errors. See PEAL, 8. CRIMINAL LAW, 2, 6, 7. HIGHWAYS, 6. INSTRUCTION JURY. RAILROADS, 8, 13. RECEIVERS, 3. VERDICT, 2–6.

16. A person is not entitled to a reversal or costs on appeal because plain error against him in the allowance of a small amount c terest, where the error is so plain that it could readily have corrected by an application in the court below and no such a cation was made. *Menz v. Beebe,*

17. The rejection of evidence to prove a fact established beyond co versy in the case is not reversible error. *Adams v. Rodman,*

18. The statement of several propositions in the conjunctive, in the tion of a special verdict, only one of which propositions is in

troversy, where the court directs the jury to answer yes or no to the question according as they shall find on the disputed proposition, is not prejudicial error. *Ibid.*

19. In a case tried by the court, the verdict of a jury, if taken, being only advisory, errors in the submission of questions or instructions given by the court in regard thereto, to the jury, are not necessarily prejudicial error. *Ibid.*

20. Unwarranted statements of plaintiff's counsel in his argument to the jury, to the effect that, by reason of its immense power as a railroad corporation, the defendant had prostituted justice and attempted subornation of perjury, are *held* to be so prejudicial as to warrant reversal of a judgment in plaintiff's favor, unless properly rebuked by the trial court. *Masterson v. C. & N. W. R. Co.* 571

21. Where counsel abuse their privilege in their argument to the jury, it is the duty of the trial court to interpose with vigor and stop it; and a mere statement that the remark is subject to criticism, or that it is rather a strong statement, is insufficient to correct the evil. *Ibid.*

Modification of judgment before affirmance.

22. A judgment in an equity case may be modified on appeal and affirmed as modified. *Menz v. Beebe,* 342

Costs: Printing: Cases and briefs.

23. The printed case herein, containing the bill of exceptions in full, and the appellant's brief, which fails to make the proper references to the record, are *held* not to comply with Supreme Court Rules VIII, IX; and an allowance for the printing thereof was properly refused in the taxation of costs. *Crouse v. C. & N. W. R. Co.* 196

Appeal from county court. See MUNICIPAL CORPORATIONS, 2, 3.

Appeal from county board. See TAX TITLES, 5.

Appeal from board of public works. See TELEPHONE COMPANIES, 3.

APPLICATION of payments. See PLEDGES.

ARGUMENTS to jury. See APPEAL, 20, 21. RAILROADS, 13.

ASSAULT with intent to rape. See CRIMINAL LAW, 8.

ASSIGNMENT.

Partial assignment of claim: Equity: Assent of debtor: Notice.

1. A contractor for work on a building procured from the architects several certificates of the amounts which he had earned in different departments of the work, in advance of the time fixed by the contract for payment, and delivered them to subcontractors for those departments, with intent thereby to assign the corresponding portions of the fund to which he was to become entitled. *Held,* that there was in equity an effectual assignment as between the parties and as against the contractor's assignee for the benefit of creditors under a voluntary assignment subsequently made. *Skobis v. Ferge,* 122

2. General information that his creditor is likely to borrow on the credit of a debt, or that he has in other instances borrowed upon it, or a mere suspicion that the creditor might have made an assignment to others, does not render a debtor liable to an assignee in respect to payments made to the original creditor before receiving exact and specific notice of the assignment. *Ibid.*

3. The assent of the debtor is essential to the existence of a d
liability to the assignee of a part of a fund in the hands of on
a banker.

4. Where the contractor for work on a building for a board of reg
having obtained from the architects several certificates of amo
earned, assigned them at the same time to subcontractors to a
on existing debts to the latter, and the board of regents did
consent to any of the assignments so as to become liable to
assignees, the equities of the assignees are equal, irrespectiv
any priority in giving notice to the board.

Of right to lien. See LIENS, 1. PARTNERSHIP, 7, 8.

Of stock certificates. See PARTNERSHIP, 3–5.

For benefit of creditors. See ASSIGNMENT, 1. RECEIVERS. VOLUNT
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BETTERMENTS. See ADVERSE POSSESSION, 1. EJECTMENT. TRUSTS,

BILL OF EXCEPTIONS. See APPEAL, 5. CERTIORARI.

BILL OF REVIEW. See JUDGMENT, 7.

BILLS AND NOTES.

See INSURANCE, 15. MORTGAGES, 1. PLEDGES. SALE OF CHATTELS,

1. The mere existence of an interlineation in a note raises no presu
tion of a fraudulent or unauthorized alteration. In the absen
some indication other than the interlineation itself, the presu
tion is that it was made before delivery of the paper. *Maldan
Smith,*

2. Where an interlineation in a note exists, but the instrument app
to have been written all at the same time, by the same hand
with the same ink, the presumptions are against a forgery, an
the absence of clear and satisfactory evidence to the contrary
presumptions should prevail.

3. If a note is definitely extended in consideration of prepaymen
interest by the principal maker, without the knowledge or con
of a surety, the latter is thereby released. *Hallock v. Yankey,*

4. A surety on the note of a corporation who, in his capacity as an
cer of the corporation, requested and procured an extension of
time for payment, is estopped to assert that he is discharge
surety because of his lack of consent as such to the exten

5. Where one of two sureties on a note is released from liability
cause the note has been extended without his consent, his co-su
is thereby, under sec. 4204, Stats. 1898, released from liability
one half the debt. The provisions of that section apply to j
sureties as well as to principal debtors, save in so far as they
limited by the proviso and by the terms of sec. 4205.

6. The purchaser of a negotiable note and the mortgage securing
not chargeable with payments thereafter made by the mortg
to a third person who did not have possession of the papers

was not the agent of the purchaser, where the latter did no act authorizing a belief that an agency existed. *Winkelmann v. Brickert,* 50

7. Where, pursuant to an option given him, the holder of a note has, before its maturity, declared the whole amount thereof to be due and payable, interest coupons subsequently maturing will not bear interest, in the absence of a clearly expressed written agreement to that effect. *Stubbings v. O'Connor,* 352

8. If there was no fraud in securing the indorsement of a promissory note, parol evidence is inadmissible to show that the indorsers did not intend to bind themselves as such. *Halbach v. Trester,* 530

9. A *bona fide* purchaser of a promissory note for value before maturity is presumed to have relied upon an indorsement thereon, and the indorsers cannot show the contrary. *Ibid.*

10. Acceptance by a creditor of the note of a third person does not constitute payment of the debt unless expressly so agreed; and the burden of proving such an agreement is upon the debtor. *Willow River L. Co. v. Luger Furniture Co.* 636

11. The holder of a note is not required to protest it for nonpayment in order to charge an indorser, timely presentation and demand of payment, and notice to the indorser, being sufficient. *Ibid.*

12. Evidence that the general manager of a corporation, after the receipt from its debtor of a note made by a third person and indorsed by the debtor, saw the secretary of the latter and informed him that the note had been received and that he would keep it and if collected would credit the amount and if not would return it, to which proposition the secretary assented, is not objectionable, upon the issue as to whether or not the note was accepted in payment of the debt, on the ground that it contradicts the legal import of the debtor's indorsement. *Ibid.*

BONDS. See REGISTER OF DEEDS. SURETYSHIP. VOLUNTARY ASSIGNMENT, 2.

BRIEFS. See APPEAL, 7, 23.

BUILDING CONTRACTS. See ASSIGNMENT, 1, 4.

BURDEN OF PROOF. See BILLS AND NOTES, 1, 2, 9, 10. FRAUD, 1, 4. INSOLVENCY, 2. MUNICIPAL CORPORATIONS, 5. RAILROADS, 18, 19. TAX TITLES, 2.

CARRIERS. See RAILROADS, 1–9.

CASES DISTINGUISHED, ETC.

1. *Cottrell v. New London F. Co.* 94 Wis. 176 (as to judgment for deficiency), distinguished. *Halbach v. Trester,* 530, 534

2. *Fifield v. Sweeney,* 62 Wis. 204. See No. 28.

3. *Ford v. Hill,* 92 Wis. 188 (as to powers of corporate officers), distinguished. *Calteaux v. Mueller,* 528

4. *Fuhrman v. Jones,* 68 Wis. 497 (as to filing bond of assignee), distinguished. *Toepfer v. Lampert,* 467

5. *Gove v. White,* 20 Wis. 425; *Kingman v. Graham,* 51 Wis. 232 (as to estoppel), distinguished. *Two Rivers Mfg. Co. v. Day,* 328, 333

6. *Harrison v. Milwaukee Co.* 51 Wis. 645 (as to highway expenditures), overruled. *Webster v. Douglas Co.* 182, 190

7. *Hewitt v. John Week L. Co.* 77 Wis. 548 (as to custom), distinguis
Shores L. Co. v. Stitt,

8. *Hughes v. Fond du Lac,* 73 Wis. 380; *Little v. Madison,* 42 Wis
(as to liability for obstruction or defect in street), distinguis
Ziegler v. West Bend,

9. *Jenkins v. Steanka,* 19 Wis. 126 (as to proof of value), distinguis
David Adler & Sons Clothing Co. v. Thorp, 7

10. *Kingman v. Graham,* 51 Wis. 232. See No. 5.

11. *Little v. Madison,* 42 Wis. 643. See No. 8.

12. *Loomis v. Rockford Ins. Co.* 77 Wis. 87 (as to divisible contract),
tinguished. *Worachek v. New Denmark M. H. F. Ins. Co.* 9

13. *McCrubb v. Bray,* 36 Wis. 333 (as to ejectment), explained and
tinguished. *Gibson v. Gibson,* 501,

14. *Menzesheimer v. Kennedy,* 75 Wis. 411; *Michelstetter v. Weine*
Wis. 298 (as to voluntary assignment), distinguished. *Sweet, D*
ster & Co. v. Neff, 482,

15. *Michelstetter v. Weiner,* 82 Wis. 298. See No. 14.

16. *Page v. Danaher,* 43 Wis. 221. See No. 22.

17. *Plum v. Fond du Lac,* 51 Wis. 393; *Reed v. Madison,* 83 Wis. 171
to applicability of statutes), distinguished. *Relyea v. Tomah*
P. & P. Co. 303,

18. *Reed v. Madison,* 83 Wis. 171. See No. 17.

19. *Revoir v. State,* 82 Wis. 295 (as to mistake in charge), distinguis
Butler v. State,

20. *Rohde v. C. & N. W. R. Co.* 86 Wis. 309 (as to gates at highway c
ing), distinguished. *White v. C. & N. W. R. Co.* 489,

21. *St. Clara F. Academy v. N. W. Nat. Ins. Co.* 101 Wis. 464 (as to am
ment of pleading), distinguished. *Carroll v. Fethers,*

22. *Schwalm v. McIntyre,* 17 Wis. 233; *Page v. Danaher,* 43 Wis. 22
to alteration in written instrument), distinguished. *Maldan*
Smith,

23. *Selleck v. Janesville,* 100 Wis. 163. See No. 26.

24. *State ex rel. Lamb v. Cunningham,* 83 Wis. 90 (as to private rela
distinguished. *State ex rel. Hartung v. Milwaukee,* 509,

25. *Stephani v. Manitowoc,* 89 Wis. 467 (as to notice of defect in str
distinguished. *Ziegler v. West Bend,*

26. *Tebo v. Augusta,* 90 Wis. 406; *Selleck v. Janesville,* 100 Wis. 163 (a
hypothetical questions), distinguished. *Schaidler v. C. & N. W*
Co.

27. *Travelers' Ins. Co. v. Fricke,* 94 Wis. 258 and 99 Wis. 367 (as to lic
fees), followed. *State ex rel. Fidelity & C. Co. v. Fricke,* 107,

28. *Van Oss v. Synon,* 85 Wis. 661; *Fifield v. Sweeney,* 62 Wis. 204 (a
nature of action), distinguished. *Lane v. Frawley,* 875,

29. *Windross v. McKillop,* 98 Wis. 525 (as to reversal), a suggestion
rected. *Menz v. Beebe,*

CAUSE OF ACTION. See ACTION.

CERTIFICATES OF STOCK. See PARTNERSHIP, 3–5.

CERTIORARI.

A writ of *certiorari* does not vacate the order or judgment challenged thereby, but merely suspends its execution. It does not prevent the giving of notice of the entry of the judgment or order for the purpose of setting the time running within which a bill of exceptions must be settled. *State ex rel. C. & N. W. R. Co. v. Burnell,* 282

CHARGING THE JURY. See INSTRUCTIONS TO JURY.

CHATTEL MORTGAGES. See FRAUDULENT CONVEYANCES, 2, 3. GARNISHMENT, 2. INSURANCE, 18. PARTNERSHIP, 4. VOLUNTARY ASSIGNMENT, 5.

CIRCUIT COURTS. See NUISANCES. TERMS OF COURT.

CITIES. See MUNICIPAL CORPORATIONS.

COLLATERAL SECURITY. See PLEDGES.

COMMERCIAL PAPER. See BILLS AND NOTES.

COMMISSIONER OF INSURANCE. See INSURANCE, 2–5.

COMMON CARRIERS. See RAILROADS, 1–9.

COMMON SCHOOLS.

Under sec. 528, R. S. 1878 (providing for an executive committee of town boards of school directors, to consist of the president, vice president, and secretary), and sec. 529, as amended by ch. 297, Laws of 1887 (providing that such committee shall employ such teachers as they deem necessary; that each contract shall be in writing, shall be signed by the teacher and by the president and secretary, and when completed shall be filed in the office of the town board of school directors), a contract signed by said president and secretary individually, without authority duly given by the executive committee, is not binding on the district. *McNolty v. Board of School Directors,* 261

COMPLAINT: Preliminary examination. See CRIMINAL LAW, 1.

CONDITIONAL transfers. See PARTNERSHIP, 4.

CONDITIONS.
Precedent. See CONSTITUTIONAL LAW. INSURANCE, 11. LIMITATION OF ACTIONS, 1, 6. MUNICIPAL CORPORATIONS, 4. RAILROADS, 22. SALE OF CHATTELS, 2, 8.
Subsequent. See INSURANCE, 17.

CONFIDENTIAL RELATIONS. See FRAUD, 1.

CONFLICT OF LAWS.

See JUDGMENT, 6.

The statutes of another state, prohibiting a person who has been divorced for adultery from remarrying, have no extra-territorial force, and cannot prevent him from lawfully remarrying in this state. *Frame v. Thormann,* 653

CONSIDERATION. See BILLS AND NOTES, 3.

CONSOLIDATION and severance of claims. See TAX TITLES, 5.

CONSTITUTIONAL LAW.

See JUDGMENT, 6. JURORS. LIMITATION OF ACTIONS, 1, 3. RECEIVI 1, 2. TAX TITLES, 3.

1. A right by statute to compensation for injuries can be gran upon condition, or the condition changed as to existing situatic or the right taken away entirely, in the discretion of the legi ture. Such rights are not the subject of constitutional protecti but depend solely upon the legislative will. *Relyea v. Tomaha P. & P. Co.*

2. A statute adding some new condition to the statutory right to co pensation for an injury, is not a statute of limitations affectin mere remedy, like a statute of limitations strictly so called, bu law acting upon a right, solely under legislative control. *It*

CONTRACTS.

See ACTION, 9, 10. AGENCY. APPEAL, 2. ASSIGNMENT. BILLS A NOTES. COMMON SCHOOLS. CORPORATIONS. COUNTIES. DAMAG 4. EQUITY, 1-4, 7-10. ESTATES OF DECEDENTS. EVIDENCE, FRAUD, 1, 2. FRAUDULENT CONVEYANCES. GARNISHMENT. 1, INSURANCE, 7-18. LIENS. LOGS AND TIMBER. MASTER AND SE ANT, 1-4. MORTGAGES. PARTNERSHIP. PLEDGES. PUBLIC LAN RAILROADS, 1, 7. SALE OF CHATTELS. UNIVERSITY OF WISC SIN. VOLUNTARY ASSIGNMENT, 4, 5.

1. When a person falsely represents the character or value of prope for the purpose of inducing another to part with the same by a s or exchange for other property owned by him, and relying there such other makes the sale or exchange, he may rescind the tra action within a reasonable time after discovering the fraud, returning or offering to return what he received, and compe restoration to his former situation. *Menz v. Beebe,*

2. In case of a rescission of a fraudulent transaction as stated, the fra ulent vendee becomes a trustee for his vendor and liable to accou for all property received from him; and in case he is unable restore all the property, then to account for the value, when tained, of that which he cannot restore, with interest; or if he sold it for more than its fair value, then to account for the amou so received, with interest, the rule being that the fraudulent ven has no right to profit by his fraud. *It*

3. An agent, employed to sell goods on commission for a stated peri at the end thereof pretended to exhibit and account for all uns goods, thereby showing a considerable shortage in his accou representing, apparently, property sold and the proceeds conver by such agent to his own use, and then gave a note and mortga to his principal for a part of such shortage. The principal the after discovered other unsold goods in the possession or under control of the agent, of less value than the balance of the short in excess of the note and mortgage, and subsequently enfor such mortgage, but did no other act in ratification of the set ment. *Held*, that the principal might rescind the settlement as the goods discovered after it was made, and reclaim such goo *Gay v. D. M. Osborne & Co.*

4. If a person purchase or obtain goods of another by fraud, payin part of the agreed consideration therefor, and thereafter part w

a portion of such goods to a *bona fide* purchaser, such other, upon discovering the fraud, may affirm the transaction *in toto* as to the property beyond his reach. and rescind it *in toto* as to all goods in the hands of his vendee not subject to the *bona fide* claim of any one else, and reclaim such goods without returning or offering to return what was by him received upon the transaction if it was not sufficient to more than pay for the goods not so reclaimed. The doctrine that in order to avoid a sale of property induced by fraud it is requisite that the defrauding party be completely restored to his former situation, and that any act of the defrauded party after discovering the fraud, recognizing the validity of the transaction, constitutes an irrevocable election to ratify it, is not without exception, notably, that when the transaction is separable, without injustice to the wrongdoer, in accordance with the situation of the property as regards being part subject to reclamation by the vendor by reason of being under his control, and the other not, by reason of its having been transferred to innocent third parties, the election will be construed as affecting the latter part only if that can reasonably be done, as where the act recognizing the validity of the transaction merely consists in retaining payment or enforcing payment for goods sold to innocent third parties. *Ibid.*

5. At the time of making a contract by which defendants were to cut and deliver large quantities of logs each year for several years at plaintiff's sawmill, it was agreed that defendants should purchase from plaintiff, among other things, a logging railroad and its equipment, then used in carrying logs to said mill. A bill of sale was executed, conveying in general language all of plaintiff's camp and logging outfit, with a specification of the different kinds of property of which said outfit consisted, the description therein of the railroad property being as follows: "One locomotive, eighteen cars, and all the rail and railroad material of every name and nature." Thereafter plaintiff turned over the railroad property as it then existed to defendants, and it was used by them for a considerable time, and until trouble arose between the parties, with no intimation that the transfer did not include the right to use the bed on which the rails were laid. *Held*, that the bill of sale, when viewed in the light of the transaction of which it formed a part and of the practical construction given it by the parties, conveyed the right of way of the railroad. *Shores L. Co. v. Stitt*, 450

6. In determining the meaning of words or terms used in a contract, the custom or usage of the place of the contract governs, whether both parties knew of such custom or not. The place of the contract is the place of its making, unless its terms indicate another place for performance. *Ibid.*

7. Parol evidence is admissible to show that a written contract, not under seal, of which there has been manual tradition, was not to become binding until the happening of some event or ascertainment of some fact, but not that the contract was to be presently binding and to become void on the happening of some event. *Thorne v. Ætna Ins. Co.* 593

8. The defendant county agreed to purchase a stone-crusher of plaintiff under a contract warranting the machine to be thoroughly made, of good material and workmanship, and capable of doing the work for which it was intended, and providing that three days should be allowed for testing the machine, at the expiration of which the county agreed to make settlement. *Held*, that the county was not

obliged to accept the machine unless it was demonstrated dur such three-days test that it was capable of crushing such rock existed in the county, without breakage of substantial parts. *W ern Wheeled Scraper Co. Chippewa County,*

9. The contract in such case also provided that, if any part of the chinery should prove defective or fail to fill the warranty, defendant should notify the plaintiff, etc., and that continued session of the machine for thirty days after it was set up should conclusive proof that it fulfilled the warranty. *Held*, that s notice was required only where defects were discovered after machine had been tested, and not where it failed to meet the scribed tests made under plaintiff's supervision. *I*

10. In an action on such contract the defendant pleaded failure of machine to comply with the warranty, and its evidence tended show that it was rejected, by the committee of the county bo having the matter in charge, at the end of the third day's test, cause of defects in the swinging die; that an arrangement then made between one member of said committee and plaint agent by which the latter was to take possession of the mach obtain new dies, and run it for the town of which said member chairman; that a majority of the committee were present at test, but that the machine worked no more satisfactorily than fore. On the other hand the plaintiff's evidence tended to sh that the committee agreed to said further test; that it contin four and three-fourths days; and that the machine worked sa factorily during such time, except that the swinging die began show signs of wear, but not sufficient to disable the machine. *H* that it was error for the court to submit to the jury only the q tion whether the last-mentioned test was made within a reasona time after the first die was found defective. *I*

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 6, 8–14. NICIPAL CORPORATIONS, 6, 9. NEGLIGENCE. RAILROADS, 4–7, 16, 23.

CONVERSION. See ACTION, 10. PLEADING, 2, 3.

CONVEYANCES. See ADVERSE POSSESSION, 1. EJECTMENT. EQUITY, 7–10. ESTATES OF DECEDENTS, 3–5. EXECUTIONS. FINDINGS FACT. FRAUDULENT CONVEYANCES. MORTGAGES, 2. PUBLIC LAN REGISTER OF DEEDS. TAX TITLES. TRUSTS.

CORPORATIONS.

Officers: Authority, etc. See UNIVERSITY OF WISCONSIN.

1. A corporation may, by its acts and methods of conducting its b ness, so far as third persons are concerned, as effectually clothe officers with authority to manage, and even close out its busin as though a formal vote of record were taken. *Northwestern* Co. v. Lee,

2. A sale of personal property, constituting a closing out of the busi of a corporation, accompanied by delivery of possession, is sustai in this case, although made by the president without the for sanction of the board of directors, it appearing that the article organization expressly provided that the president should have general direction, management, and control of the property, affa and business of the company, subject to the direction of the bo of directors; that during the entire existence of the corporation had conducted its affairs as chief managing officer; that the bo

of directors either knew of the transaction or did not know because they intrusted everything to the president; and that they took no steps to disaffirm it, even when garnishment proceedings had been instituted against the purchaser by a creditor of the corporation. *Ibid.*

3. A corporation, not prohibited by its charter, may purchase its own capital stock, yet such power cannot be exercised by an officer of the corporation without special authorization in that regard by its board of directors. *Calteaux v. Mueller,* 525

4. If a secretary and business manager of a corporation, having no authority other than that ordinarily incident to such a position, sell and deliver to another property of the corporation, agreeing to accept in its behalf some of its capital stock in payment therefor, and such other disable himself from returning such property by transferring title thereof to a third person, the corporation may, at its election, hold such other liable on an implied promise to pay for such property at the sale price. *Ibid.*

Officer as surety on corporation note: Extension. See BILLS AND NOTES, 4.

Officer not a "party" to corporation's suit. See EVIDENCE, 7.

Foreign corporations: License. See INSURANCE, 1–6.

Municipal corporations. See MUNICIPAL CORPORATIONS.

COSTS.

See APPEAL, 16, 23. GARNISHMENT, 3, 4. OFFICERS, 5. TRUSTS, 3.

Though costs in an equity case are in the discretion of the court, that means a legal discretion — not mere arbitrary judicial will; and unless a person has been called into court by another or prejudiced by him in some way in the action, there is nothing for the discretion of the court to act upon in mulcting such other in costs. *Menz v. Beebe,* 342

COUNTIES.

See CONTRACTS, 8–10. ESTOPPEL, 4. HIGHWAYS, 1–5. TAX TITLES.

Under sec. 1308, Stats. 1898 (authorizing the county board to adopt main traveled roads as county highways, to keep the same in repair, and to designate other roads for the purpose of making repairs thereon without adopting them as county roads), a county may purchase a stone-crusher; and the fact that a purpose was expressed to rent such machine to the several towns did not take away such power. *Western W. S. Co. v. Chippewa Co.* 614

COURT AND JURY.

See CONTRACTS, 10. INSTRUCTIONS TO JURY. JUDGMENT, 1. MASTER AND SERVANT, 7, 9, 10. MUNICIPAL CORPORATIONS, 9. RAILROADS, 4–6, 8, 9, 14, 16. REPLEVIN.

1. The rule that disputed questions of fact on evidence are to be answered by the jury applies only where the evidence is such that there is room for different reasonable inferences therefrom. If the truth of propositions of fact upon which the right of recovery depends be not within the range of reasonable probabilities, no ques-

tion in regard to them need be sent to a jury though there is
dence as to their truth. *O'Brien v. C., St. P., M. & O. R. Co.*

2. To entitle plaintiff to have his alleged cause of action submitte
a jury for decision, he must produce evidence from which sens
men of unbiased minds can reasonably decide the issues in
favor. *I*

3. The rule that, in determining whether a nonsuit should be gran
or a verdict directed, the evidence of plaintiff only should be
sidered, contemplates the consideration of such evidence in
light of matters of common knowledge and facts established bey
reasonable controversy in the case, whether by evidence of plai
or defendant or both. *I*

4. If the evidence of plaintiff, taking the most favorable view of i
his behalf that it will reasonably bear, including all reasonable
ferences therefrom, and assuming that it establishes all that it te
to establish when viewed in the light of conceded or undispu
facts, will not support a verdict in his favor, the verdict, on requ
being made therefor, should be directed against him. *I*

COURTS. See APPEAL. JUDGMENT. RECEIVERS. TERMS OF COURT.

CREDITORS' REMEDIES. See ACTION, 8, 10. AGENCY, 3. ASSIGNM
CONTRACTS, 3, 4. CORPORATIONS, 4. EQUITY, 4, 6, 7. ESTATES
DECEDENTS, 5. FRAUDULENT CONVEYANCES. GARNISHMENT.
SOLVENCY. LIENS. PARTNERSHIP, 1, 2, 6-8. PLEDGES. RECEIV
VOLUNTARY ASSIGNMENT.

CRIMINAL LAW AND PRACTICE.

1. A complaint made before a justice of the peace, which alleges in
language of the statute that the defendant did wilfully, fel
ously, and with malice aforethought kill and murder a cert
person, is sufficient to give the justice jurisdiction upon the
liminary examination. *Butler v. State,*

2. On the trial of an issue as to the sanity of a person charged w
murder the admission of a physician's testimony that cuts on
body of the victim appeared to have been made by a sharp ins
ment and that death occurred from a fracture of the skull
hemorrhage, was not prejudicial to defendant, where those f
were wholly undisputed throughout the case. *I*

3. An instruction that insanity, to constitute a defense, must be s
a perverted and deranged condition of the mental and moral fa
ties as to render a person incapable of distinguishing betw
right and wrong, or not conscious, at the time, of the nature of
act which he is committing, or such a complete destruction, ot
than voluntary, of his will that his actions are not subject to it
are beyond his control, is *held* to state correctly the rule of
most favorable to defendant. *I*

4. An instruction in a criminal case that a reasonable doubt is a do
for which a reason can be given based on the evidence in the c
is correct. *I*

5. An instruction defining a reasonable doubt as being, among ot
things, "such a doubt as would govern and control a reasona
prudent man, and deter him from acting or deciding in his o
most important affairs and concerns of life," is not errone
I

6. A mistake, in charging the jury that a reasonable doubt is one which, after a consideration of all the evidence in the case, "leaves the minds of the jury in that condition that they *can* say that they feel an abiding conviction, to a moral certainty, of the truth of the charge,"— using the word "can" instead of "cannot,"— is *held* not to have been a material error, where it is evident from the circumstances and the remainder of the charge that the jury could not have been misled thereby. *Ibid.*

7. An instruction that, if there is one single material fact in the case proved to the satisfaction of the jury by a preponderance of the evidence which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt and justify an acquittal, is not erroneous as tending to imply that unless some substantive fact is proved by the preponderance of the evidence it will not raise a reasonable doubt, where full and accurate instructions were given as to the persistency of the presumption of innocence, the propriety of the most charitable and merciful construction of the facts, and the necessity that every reasonable doubt should be removed before conviction would be justified. *Ibid.*

8. In a prosecution of a father for an assault with intent to commit rape upon his daughter, the fact that there was no evidence of injury to the person of the prosecutrix, no outcry when help was at hand, and no complaint until long afterwards, taken in connection with her threats against her father, her ill feeling against him as manifested on the trial, and the evident desire of the whole family to get rid of him, is *held* to throw such doubt upon her story that a conviction based upon her uncorroborated evidence will not be sustained. *Wilcox v. State*, 650

CROSS-EXAMINATION. See EVIDENCE, 1, 9.

CUSTOM. See CONTRACTS, 6. LOGS AND TIMBER, 3.

DAMAGES.

See LOGS AND TIMBER, 1. MASTER AND SERVANT, 3, 4. RAILROADS, 2, 3, 12. REGISTER OF DEEDS. SALE OF CHATTELS, 10, 11.

1. In an action by a married man for personal injuries, he is entitled to recover the value of his wife's services in nursing him, rendered necessary by the injuries. *Crouse v. C. & N. W. R. Co.* 196

2. In an action for personal injuries producing permanent disability, the annuity tables found in the Revised Statutes are admissible upon the question of damages, but they are to be considered in connection with all other evidence on that issue, and not to be treated as the mathematical basis for determining such damages. *Ibid.*

3. The fact that the plaintiff is a married man cannot be considered in determining the damages for a personal injury. *Ibid.*

4. In an action founded on false and fraudulent representations of defendant whereby plaintiff was induced to enter into a contract to cut and bank the timber on certain lands of defendant, the tort being waived and a recovery sought on implied contract, plaintiff cannot recover as damages the profits which he would have made on the performance of the contract had the facts been as represented, but can recover only the amount which the defendant has been enriched or benefited by his false representations. *Huganir v. Cotter*, 323

DEATH by wrongful act, etc. See ACTION, 1–5. RAILROADS, 11–13.

DEBTOR AND CREDITOR. See ACTION, 8, 10. AGENCY. ASSIGNMENT. BILL AND NOTES, 10, 12. CONTRACTS, 3, 4. CORPORATIONS, 4. EQUIT 4, 6, 7. ESTATES OF DECEDENTS, 5. EXECUTIONS. FRAUDULEN CONVEYANCES. GARNISHMENT. INSOLVENCY. LIENS. PARTNE SHIP, 1, 2, 6–8. PLEDGES. RECEIVERS. VOLUNTARY ASSIGNMEN

DECEIT. See ACTION, 6, 7, 9. DAMAGES, 4.

DEDICATION of streets, etc. See PLAT OF LANDS.

DEEDS. See EQUITY, 1, 2, 7, 8. ESTATES OF DECEDENTS, 5. FINDING OF FACT. FRAUDULENT CONVEYANCES, 1. INSURANCE, 17. MORGAGES, 2. REGISTER OF DEEDS. TRUSTS.

DEFINITIONS. See WORDS AND PHRASES.

DELAY in bringing action. See EQUITY, 1, 8. HIGHWAYS, 2. OFFICERS,

DEPOSITIONS. See EVIDENCE, 3–5. VOLUNTARY ASSIGNMENT, 1.

DISABILITY. See INSURANCE, 7, 8.

DISCRETION. See COSTS. GARNISHMENT, 4. PLEADING, 2.

DISSOLUTION of partnership. See PARTNERSHIP, 2.

DIVORCE.

See CONFLICT OF LAWS.

1. Under sec. 2364, Stats. 1898 (providing that in actions for divor the court may adjudge to the wife such alimony out of the esta of the husband, for her support and maintenance, as it shall dee just and reasonable, having always due regard to the situation the parties and all the circumstances of the case), the court is n limited to making an allowance payable at stated periods, but ma allow a sum of money payable in gross. *Hooper v. Hooper*, 5

2. In an action for divorce brought by the wife it appeared, amo other things, that the parties were about sixty years of age, h been married twenty years, and occupied a high social positio that defendant had property worth $80,000, and received a lar income therefrom as well as from his professional business; a that the plaintiff was without fault except such as the defen ant was in duty bound to condone. *Held*, that an allowance to t plaintiff of $7,000 payable in gross, together with a monthly allo ance equal to about one seventh of the defendant's income, w not excessive. *Ib*

DOMICILE.

1. In a proceeding to probate a will the evidence (stated in the opinio is *held* to sustain a finding that the testator, formerly a resident Louisiana, was at the time of his death a resident of and domicil in this state. *Frame v. Thormann*, 6

2. In order to effect a change of domicile from one state to another is only essential that there should be a removal accompanied by intention to make the new abode a permanent residence or hom and the fact that there was an intention to return to the form domicile at some future indefinite time would not prevent t change from taking effect. *Ib*

DORMANT PARTNER. See PARTNERSHIP, 2.

EJECTION of passenger from train. See RAILROADS, 1–3.

EJECTMENT.

See ADVERSE POSSESSION, 1. ESTATES OF DECEDENTS, 4.

A holding under an invalid certificate of homestead entry is not a holding "by color of title" such as will support a recovery for improvements under sec. 3096, R. S. 1878. *Whitcomb v. Provost*, 278

ELECTION between remedies. See ACTION, 10. CONTRACTS, 4. CORPORATIONS, 4. DAMAGES, 4. PARTNERSHIP, 5. PLEADING, 2, 3.

ENTIRE CONTRACT. See APPEAL, 2. INSURANCE, 13, 14. MASTER AND SERVANT, 1–4.

EQUITY.

See ACTION, 8. APPEAL, 1, 22. ASSIGNMENT, 1, 4. COSTS. DIVORCE. ESTOPPEL. FRAUD. FRAUDULENT CONVEYANCES. GARNISHMENT, 4. HIGHWAYS, 2–5. JUDGMENT, 2, 7, 8. MORTGAGES. NUISANCES. OFFICERS. RECEIVERS. SURETYSHIP. TRUSTS AND TRUSTEES.

1. Mere delay, short of the statutory period of limitation, in bringing an action to reform a deed does not preclude the granting of such relief, where the action is brought soon after the discovery of the mistake on which it is based, and it does not appear that the other party has been prejudiced by the delay. *Ellis v. S. W. L. Co.* 400

2. By mistake the land in question, the title to which was held in trust, was conveyed by the trustee with other lands to a corporation of which he was president and manager, conducting its business and his own as if they were one. When he afterwards withdrew from the corporation he conveyed to it all his property of every kind in consideration of its assuming certain indebtedness. Thereafter the corporation delivered to him a lease of the land in question which had been executed by it as lessor, with intent to relinquish any claim to the property. The mistake had not then been discovered, and both parties supposed the legal title to this land was still in the trustee. *Held*, in an action by the *cestui que trust* to correct the mistake by reformation of the original deed to the corporation, that the latter was not entitled, as a condition of a recovery, to have the *cestui que trust* pay to it the sum, if any, which he owed the trustee on account of the land. *Ibid.*

3. A complaint alleged that the defendant corporation, in consideration of plaintiff's relinquishment to it of all his interest as a stockholder and the conveyance to it of personal property, agreed to pay certain debts owing by plaintiff, and that it had failed and refused to pay a part thereof. It did not allege insolvency of the defendant or facts entitling plaintiff to a rescission of the contract. It prayed for an accounting and that defendant be required to reconvey. *Held*, that a general demurrer was properly sustained on the ground that the remedy at law for the breach of the contract was complete and adequate. *Ellis v. Southwestern Land Co.* 400

4. Where, in consideration of the transfer of property to him, a person has agreed to pay certain debts of the vendor, his failure to pay a part of them does not entitle the vendor to a rescission of the contract. *Ibid.*

5. An action for equitable relief cannot be sustained on the ground that it *may* prevent a multiplicity of actions, where no facts are alleged to show that such will be the result. *Ibid.*

6. To sustain a suit in equity for an accounting, some special and substantial ground of equity jurisdiction must be alleged, and it must appear that the remedy at law is inadequate. *Ibid.*

7. In an action for an accounting and to compel a reconveyance of
erty on the ground that defendant had failed to pay debts of pla
which it had assumed in consideration of the transfer, equity
not take jurisdiction on the ground that plaintiff has a ven
lien on land sold, where it appears that the land was conveyed
to the making of the contract in question and was not a part
consideration.

8. An aged couple conveyed their entire property, a homestead o
acres, to a married daughter, E., in consideration of an agree
on her part to support them during their lives and to suppo
unmarried daughter so long as she remained single,— all to r
upon the premises. The grantee resided on the land but a
months, and then moved away and ceased to support her pa
and sister, who continued, however, to reside there until the fat
death a year and a half later, no steps being taken to rescin
conveyance. Immediately after the father's death another dau
and her husband, J., moved upon the premises, and within a
months J. obtained a deed of the premises from E., express
consideration of $50. The mother and the unmarried dau
subsequently consented in writing to the conveyance to J. a
his assumption of the contract for support, and he continued t
after to perform that contract to the satisfaction of the bene
ries. No objection on the part of the other heirs was made
after the death of the mother about two years later. *Held*,
said heirs were guilty of such laches as would preclude them
asserting any right they might have had upon the death of
father to a rescission of the conveyance and a revesting of the
in his heirs. *Cross v. Bowker*,

9. Before a court of equity will enforce an alleged parol agreeme
convey land there must be shown a specific agreement to co
based upon a good consideration. A mere intention, even th
repeatedly asserted and partly executed, is not enough. *Si*
Decker,

10. In an action to foreclose a mortgage given by T. on lands purch
by him from plaintiff's husband, since deceased, a daughter o
grantor answered by way of counterclaim that while residi
Kansas she had been induced by her father to move to Wisc
and reside with him by promises that if she would do so she sh
have the lands in question; that her father had then given he
lands upon the condition that she should give him one third o
crops raised thereon during his lifetime; that she had accepte
gift and entered into possession of the premises, to the know
of the plaintiff, and was still in possession thereof; that whi
her father had caused a deed of said lands to her to be prep
but was induced by the fraud and undue influence of the plaintif
to execute it; and that while feeble in mind and body he had
induced, by like fraud and undue influence, to convey the l
to T. and take back the note and mortgage in plaintiff's nam
a part of the purchase money. *Held*, that no legal or equit
right of the daughter in the lands was shown which would
rant the interposition of a court of equity.

ESTATES OF DECEDENTS.

See ACTION, 5, 7. DOMICILE, 1. JUDGMENT, 6. PARTNERSHIP, 2, 8. W

1. A pledge by an executor of the assets of the estate, even th
made to secure a loan for his own personal benefit, is valid i
pledgee has no knowledge or notice of the intended perversi

the proceeds, but takes the property in good faith. *Hemmy v. Hawkins,* 56

2. An executor wrote to the defendant, from whom he proposed to borrow money, that the county judge would make an order in regard to a loan, and then he would be ready to take it. After receiving a favorable reply, he sent to the defendant a note signed by him as executor, also a note and mortgage belonging to the estate, assigned by him as executor, as collateral. In a letter accompanying the instruments he requested the defendant to place the larger part of the money in the bank to his (the executor's) credit, and retain the balance for awhile "as that is mainly to pay expenses of administration, part of it coming to me." *Held,* insufficient to charge the defendant with knowledge that the loan was not made for the benefit of the estate. *Ibid.*

3. A finding of the trial court that an administrator was not interested directly or indirectly in a sale of the land of his intestate is *held* to be against the preponderance of the evidence in this case, from which it appears, among other things, that the land was bid in at a fair price by the administrator's son, who is not shown to have had any means to pay for it; that before the sale was completed, in order to procure the discharge of mortgages then existing on the land to an amount equaling about three fourths of the purchase price, the administrator mortgaged his own land and joined with his son in giving notes secured by mortgage on a part of the land in question; that within two months after the sale was completed the son deeded to his father most of the unincumbered part of the land; and that the explanation of these transactions and the testimony as to how the son paid for the property are vague and unsatisfactory. *Gibson v. Gibson,* 501

4. Under sec. 3914, Stats. 1898, providing that if an administrator is interested, directly or indirectly, in the purchase of land sold by him in his official capacity the sale shall be void, such a sale is not absolutely void, but voidable only, and until it is set aside in a proper action the purchaser has the legal title to the land and the person entitled to question the sale cannot maintain ejectment. *McCrubb v. Bray,* 36 Wis. 333, distinguished. *Ibid.*

5. An administrator cannot maintain an action under sec. 3832, Stats. 1898, to set aside a deed of his decedent on the ground that it was made with intent to defraud creditors, except for intent to defraud the existing creditors, who alone are represented by him. *O'Malley v. O'Malley,* 639

ESTOPPEL.

See BILLS AND NOTES, 4. HIGHWAYS, 4. PLEADING, 1.

1. The plaintiff corporation, being the owner of pine lands, was applied to by defendants to fix a price on certain tracts, including the tract in suit. It gave a price on the other lands, but stated positively to defendants that it did not own the tract in suit. It knew, at the time, that defendants were logging all the pine lands they could profitably purchase in that vicinity and were constantly in the market to buy such lands, and that one B. claimed to own the tract in question under a tax deed and had offered it for sale to others. Relying on plaintiff's disclaimer, defendants bought the tract from B. *Held,* that plaintiff was estopped from asserting its title as original owner of the tract, even though it believed, when

it made the disclaimer, that B.'s tax title was valid. *Two I Mfg. Co. v. Day,*

2. The fact that the state of the title was apparent from the reco not prevent an estoppel, the positive disclaimer by plaintiff h been such as to encourage and mislead defendants into expen upon the bad or doubtful title. *Gove v. White,* 20 Wis. 425 *Kingman v. Graham,* 51 Wis. 232, distinguished.

3. A public corporation is not estopped by mere mistakes of its of in performing their official duties imposed upon them by law, *bert v. Pier,*

4. A county is not estopped from claiming title to lands which, as of the county, were exempt from taxation, by reason of the a officers in taxing the lands, selling them for the taxes, and st at the time of the tax sale that the county had no interest i lands, although the purchaser relied upon such statement in chasing at such sale and thereafter taking a tax deed.

EVIDENCE.

See APPEAL, 9–15, 17. BILLS AND NOTES, 1, 2, 9, 10, 12. CONTRAC COURT AND JURY. CRIMINAL LAW, 2, 8. DAMAGES, 2, 3. EST OF DECEDENTS, 2–4. FRAUD, 3–5. GARNISHMENT, 1. HIGHW 6, 7. INSOLVENCY, 2, 3. INSURANCE, 18. JUDGMENT, 3–5. AND TIMBER, 3. PLEADING, 3. RAILROADS, 11, 12, 18, 19, 21. CEIVERS, 3. REPLEVIN. SALE OF CHATTELS, 4. TAX TITL VOLUNTARY ASSIGNMENT, 1, 3. WILLS, 2–4.

1. An error in not permitting a witness to be fully cross-exami cured by permitting an exhaustive cross-examination on the subjects when he reappeared in rebuttal. *Plano Mfg. Co. v. mann,*

2. In an action upon a written contract for the sale of a binde court properly sustained an objection to a question, asked purchaser, as to what the bargain was; and such ruling was refusal to permit the purchaser to testify as to represents made to him by the vendor's agent before and at the time the tract was signed.

3. The incompetency of a party under sec. 4070, R. S. 1878, to test to personal transactions between himself and one whom he c to have been the agent of the adverse party, is not removab the examination of such party otherwise than as a witness instance of such adverse party and the introduction of such ination in evidence by such party in his own behalf. *Malda Smith,*

4. The incompetency of a party to testify under sec. 4070, R. S. 1 removable only by the conduct of the adverse party in the m indicated in such section. The door for such party to test closed by the statute against any effort of his to open it. T verse party must open the door, if opened at all.

5. The mere taking of a deposition does not make it evidence for party. Though it may be offered by either, when offered it evidence of the party offering it, regardless of at whose insta was taken.

6. Information acquired by a physician while examining a perso for the purpose of curing or helping her, but to determine the tion of her mental competency with a view to an applicati

her release from guardianship, is not "information necessary to enable him to prescribe for such patient as a physician," within the meaning of sec. 4075, R. S. 1878. and the physician may, therefore, give testimony thereof. *In re Will of Bruendl,* 45

7. An officer of a corporation which is a party to an action in which the opposite party claims under a deceased person is not himself a "party" so as to be incompetent, under sec. 4069, R. S. 1878, to testify in respect to transactions had by him personally with such deceased person. *Ibid.*

8. The opinion of a nonexpert witness as to the mental condition of a person cannot properly be received in evidence until such witness has first qualified himself by stating facts within his personal knowledge and means of personal observation, such as to satisfy the court of his ability to give an intelligent opinion liable to be of some assistance to the jury in coming to a correct conclusion. *Crawford v. Christian,* 51

9. A witness cannot properly be cross-examined as to a mere collateral matter, not affecting his credibility, but tending to disgrace him. *Ibid.*

10. An hypothetical question to an expert witness, which, after stating in detail the particulars of the plaintiff's injury, his symptoms, treatment, and subsequent physical condition, asks the witness what in his judgment was the cause of the plaintiff's condition, *held* proper. *Crouse v. C. & N. W. R. Co.* 196

11. Proof of the mailing of a written notice in time to reach the person addressed in the regular course of the mail, *prima facie* establishes the fact that it was so received. *Small v. Prentice,* 256

EXAMINATION of offenders. See CRIMINAL LAW, 1.

EXCEPTIONS. See APPEAL, 4–6.

EXCESSIVE DAMAGES. See RAILROADS, 2.

EXECUTIONS.

See INSOLVENCY, 4. VOLUNTARY ASSIGNMENT, 8.

1. Mere inadequacy of price paid at an execution sale of land will not justify the setting aside of the sale, especially as against *bona fide* purchasers from the purchaser at such sale. *Phillips v. Hyland,* 253

2. Failure of the register of deeds to index a certificate of the sale of land on execution, as required by sec. 761, R. S. 1878, does not invalidate the sale. *Ibid.*

EXECUTORS AND ADMINISTRATORS. See ACTION, 1–5, 7. ESTATES OF DECEDENTS. JUDGMENT, 6. PARTNERSHIP, 2, 8. WILLS.

EXEMPTIONS. See INSOLVENCY, 4.

EXPERT TESTIMONY. See EVIDENCE, 6, 8, 10. RAILROADS, 11.

EXTENSION of time for payment. See BILLS AND NOTES, 3–5.

FALSE REPRESENTATIONS. See ACTION, 6, 7, 9. DAMAGES, 4.

FENCES. See RAILROADS, 22, 23.

FILING.
Of chattel mortgages. See PARTNERSHIP, 4.
Of bond of assignee. See VOLUNTARY ASSIGNMENT, 2.

FINDINGS OF FACT.

See APPEAL, 8–15. PRACTICE, 2.

In an action to set aside deeds on the ground of fraud, a findin the trial court that purchasers from plaintiff's grantee took t with notice of facts and circumstances sufficient to put them u inquiry, which would have led them to discover the fraud of t grantor in obtaining title from the plaintiff, is *held* to be an in ence of fact from various items of evidence, and not a conclus of law. It will therefore not be disturbed unless the evidence ponderates against it. *Bandell v. Jelleff,*

FIRE INSURANCE. See INSURANCE, 9–18.

FOREIGN CORPORATIONS. See INSURANCE, 1–6.

FOREIGN JUDGMENT. See JUDGMENT, 6.

FORFEITURE. See INSURANCE, 9, 10, 12–14, 16–18.

FRAUD.

See BILLS AND NOTES, 1, 2. CONTRACTS, 1–4. DAMAGES, 4. EQUITY, FINDINGS OF FACT. FRAUDULENT CONVEYANCES. JUDGMENT SALE OF CHATTELS, 1. WILLS, 3.

1. Proof that the agent with whom the defendant contracted for purchase of a harvester was a man with whom the defend had traded for years and in whose integrity and business stand he had confidence, is not sufficient to raise a presumption of a c fidential relation, which would shift the burden of proof as to fra in the transaction from the defendant to the plaintiff. *Plano M Co. v. Bergmann,*

2. Instructions to the effect that a party who procures the execut by another of a contract by fraud and misrepresentation can then bar a defense thereto, on the ground that the other party been ignorant or negligent, are *held* to have been properly refu as inapplicable to any of the questions submitted for a special v dict, although they might have been proper and applicable there been a general verdict; and they were rendered wholly material by a finding of the jury that the contract in suit was so procured. *It*

3. The admissions of an alleged defrauded party, made long after act sought to be avoided for fraud occurred, are not admissible evidence to affect the title to property involved. *Small v. Ch peny,*

4. In the submission to a jury of a cause of action, predicated on cumstances which in law raise a presumption of fraud or un influence, it is improper to say that the burden of proof is on person charged, to disprove it. The true rule is that when circu stances are established from which, as a matter of law, a presun tion of fraud or undue influence arises, then the burden of proo on the party charged with being guilty thereof to show that h innocent and that the alleged defrauded party acted voluntar and of his own free will. *It*

5. In an action to recover moneys alleged to have been advanced plaintiff for the purchase of securities which were assigned to defendant, the plaintiff acknowledged that he received the mon from the defendant's husband, since deceased, but claimed that

was paid to him by the deceased in satisfaction of a debt contracted seventeen years previously. *Held*, that such claim might be met by proof of the fact that plaintiff had for years been in straitened circumstances while the deceased had ample means and property, such evidence tending to show that the claim was fraudulent. *Williams v. Williams*, 246

FRAUDS, STATUTE OF. See EQUITY, 9, 10. FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCES.

See ESTATES OF DECEDENTS, 5. GARNISHMENT, 2. PARTNERSHIP, 1.

1. A debtor made a voluntary transfer of all his personalty to his wife, and at the same time a voluntary conveyance to her, through a third person, of all his realty, by a deed stating that the conveyance was made subject to the reasonable and necessary support of such debtor, and that the same was intended to be and remain a lien upon said premises during his life. *Held*, that the two conveyances must be construed together as one act, and were, within the meaning of sec. 2306, Stats. 1898, gifts in trust for the person making the same, and as such were void as against creditors. *Stapleton v. Brannan*, 26

2. The principal defendants owed their father about $2,100, and others about $6,000. To secure the debt to their father one of them gave him a mortgage on a stock of goods worth about $1,500, but remained in possession. The other transferred, by absolute bill of sale, and delivered to the father a stock of goods for an expressed consideration of $1,552, which was about their actual value, though their inventory price was about $2,000. This transfer was claimed by the son to be a payment *pro tanto*, but by the father to be as security only. Afterwards plaintiff obtained a judgment against the sons, and garnished the father. *Held*, that the transaction stated did not justify an inference of fraud which would render the father liable as garnishee in respect to the goods delivered to him. *Cunningham v. Eagan*, 272

3. Where chattel mortgagees had no knowledge that the mortgagor was insolvent at the time the mortgage was given, and parted with their money relying on the strength of the security, it cannot be set aside in garnishment proceedings instituted by other creditors, unless it is shown that the mortgagors had a design to defraud their creditors and that the mortgagees participated therein. *German American Bank v. Magill*, 582

GAMING CONTRACTS. See GARNISHMENT, 1.

GARNISHMENT.

See ACTION, 8. APPEAL, 6. FRAUDULENT CONVEYANCES, 2, 3. PARTNERSHIP, 5.

1. In garnishment proceedings, evidence that as to money deposited by the defendant with the garnishee the latter was stakeholder on a wager, and that the defendant had no beneficial interest therein but had acted as agent for another in making the deposit, was admissible as against the objection that the garnishee could not prove an illegal transaction as a foundation for a defense. *Stadler v. Smith*, 298

2. The mortgagee in a chattel mortgage of firm property given t
cure a *bona fide* debt owing to him by the partners individuall
not subject to garnishment by the firm creditors after he has
the property and applied the proceeds upon the debt, even if
mortgage was fraudulent as to such creditors. *Excelsior Mill*
v. Hanover,

3. A garnishee who denies liability and, upon trial of the issue, is
cessful, is entitled to recover costs of the plaintiff under sec. 2
R. S. 1878, providing that, in case of a trial between plaintiff
garnishee, if the plaintiff do not recover more than the garni
admitted by his answer, the latter shall recover costs. *Dowlin*
Fire Asso.

4. Where in such a case the garnishee is entitled to costs the court
no discretion to limit the amount thereof to a fixed sum, but t
should be taxed and allowed as prescribed by the general sta
(sec. 2921, R. S. 1878). 1

GATES at highway crossing. See RAILROADS, 10.

GOOD FAITH. See HIGHWAYS, 4.

GROSS NEGLIGENCE. See RAILROADS, 14.

GUARDIAN AND WARD. See PARTNERSHIP, 6.

HIGHWAYS.

Powers of county board: Limit of expenditure: Injunction. See C
TIES.

1. Under sec. 1308, R. S. 1878, providing that any county board
annually levy "a county road tax not exceeding $8,000, which s
be expended under their direction in making culverts, grad
graveling, ditching, or otherwise improving" highways which h
been adopted as county roads or designated for the purpos
spending money in their repair, the amount which a county
spend upon highways in any one year is limited to the amo
previously raised by tax. Whatever was said to the contrar
Harrison v. Milwaukee Co. 51 Wis. 645, is overruled. *Webst*
Douglas Co.

2. Although a taxpayers' suit to enjoin an illegal expenditure of mo
upon highways pursuant to an unauthorized resolution of
county board was not commenced until after a part of the w
had been done and some payments had been made thereon,
held that this was not such laches as would bar the action in
spect to future work. 1

3. An injunctional order forbidding county officers to expend
money or do any work on highways pursuant to an unauthor
resolution of the county board, or until after a road tax sh
thereafter be levied, was modified so as to allow necessary rep
to be made upon county roads or roads which had been design
for the expenditure of county money. *Held*, that this merely
mitted such repairs as were necessary to make travel safe, and
not allow general road work, as contemplated by the resolutio
be carried on. 1

4. The deliberate disobedience of the injunctional order by the co
officers in proceeding with general road work and paying for
same could not be in good faith, nor could there be any ratifica
of their act by the county board, or any estoppel, which would
lify the command of the court. 1

5. The county officials who assisted in such violation of the injunction, either by voting the issuance of orders or by countersigning the same or by paying out the money thereon, as well as the persons who received the money, to the extent of the amounts respectively received by them, should be required, in a taxpayers' action, to repay to the county treasury the sums so wrongfully paid out. *Ibid.*

Dedication of streets, etc.: Acceptance. See PLAT OF LANDS.

Telephone poles in highways: Municipal regulations. See TELEPHONE COMPANIES.

Defects: Injuries to travelers: Notice. See MUNICIPAL CORPORATIONS, 4–9.

6. In an action against a town for personal injuries alleged to have been caused by a defective highway, it was error to permit a witness, who stated that he had met with an accident at the same place some little time before plaintiff's accident, to testify that he had talked about it in the town, for the purpose of showing that the town board was chargeable with notice of the defect; but when it appeared on his cross-examination that one of the persons with whom he had talked was a member of the board the error became immaterial. *Little v. Iron River,* 250

7. In such action a statement in the charge to the jury that there was no question, under the evidence, but that there was a depression or hole, and an accumulation of bark near it, in the highway, was proper where the only testimony on the subject was that of five witnesses for plaintiff and one for defendant who testified to the fact as stated, and that of two witnesses for defendant who testified to an accumulation of bark but did not notice a hole. *Ibid.*

8. The notice of injury from defects in a highway, required by sec. 1339, R. S. 1878, need not be personal notice. A notice mailed to and received by the proper officer is sufficient. *Small v. Prentice,* 256

Injuries to travelers at railway crossings. See RAILROADS, 10—13.

HOMESTEAD ENTRIES. See ADVERSE POSSESSION, 1. EJECTMENT. PUBLIC LANDS.

HUSBAND AND WIFE. See CONFLICT OF LAWS. DAMAGES, 1. DIVORCE.

HYPOTHETICAL QUESTIONS. See EVIDENCE, 10. RAILROADS, 11.

ILLEGITIMATE CHILDREN. See WILLS, 5, 6.

IMPROVEMENTS. See ADVERSE POSSESSION, 1. EJECTMENT. TRUSTS, 1, 2.

INCONSISTENCY in special verdict. See VERDICT, 1.

INDEFINITENESS in notice. See RAILROADS, 22.

INFANTS. See LIMITATION OF ACTIONS, 6. MASTER AND SERVANT, 12.

INJUNCTION. See APPEAL, 3. HIGHWAYS, 2–5. NUISANCES. OFFICERS, 1.

INSANITY. See CRIMINAL LAW, 2, 3. EVIDENCE, 8. JUDGMENT, 3–5.

INSOLVENCY.

See FRAUDULENT CONVEYANCES, 3. PARTNERSHIP, 1, 2. RECEIVERS. SALE OF CHATTELS, 1. VOLUNTARY ASSIGNMENT.

1. Although the requirements of ch. 179, R. S. 1878, in respect to an insolvent debtor seeking a discharge from his debts literally relate only to the procedure, namely the filing of the necessary papers, etc., yet under the provision of sec. 4296, that an assignment shall be directed if it shall appear that the insolvent "has in all respects

conformed to the *matters required of him* in this chapter," not
the filing of the papers should be shown but also the existenc
the facts required to be stated therein. *In re Callahan,*

2. The burden of proof is at all times upon the debtor in such a
and the court is entitled to the utmost frankness and the fu
explanation before it can be satisfied of the material facts,
cially if any suspicious circumstances appear. *I*

3. The uncorroborated testimony of the debtor in such a case, tha
was a physician and commenced practice in 1891; that his busi
had been prosperous, so that up to 1896, the year after a claim
malpractice was made against him, he had not only supported
family and accumulated reasonable library and apparatus, but
built an expensive homestead costing some $4,800, and had
over to his wife some $2,000 claimed to have been borrowed of
and that at the time of his petition, but a little more than a
thereafter, he had absolutely nothing except a list of accounts w
but $100 or $200, is *held* insufficient to warrant his discharge,
cially when discredited by the facts that he ceased to keep a b
account almost immediately after the rendition of a large ver
against him on the claim for malpractice; that he kept none th
after, although one was kept by his wife; that no explana
whatever was given of the disposal of his professional income s
that time; that he accounted for the loss of his case book in wh
charges for professional services were made by the improb
story that it had been stolen, and testified that the inventory of
debtors owing for professional services was made from memory a
the alleged theft. *I*

4. It is better practice under ch. 179, R. S. 1878, for the insolvent de
to comply with the letter of the statute and schedule "all hi
tate," including exempt property, even if it is not absolutely ne
sary to include the exempt property. *I*

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 3-7. FRAUD, 2, 4. HIGHWAYS, 6, 7. MASTER
SERVANT, 2, 14. RAILROADS, 8, 9.

1. The giving of an instruction on a material point, susceptible of
constructions, one that condemns it and one that does not, wh
the jury may have adopted either construction, is reversible er
Small v. Champeny,

2. An instruction which states to the jury what will be the effec
their answer to a question submitted for special verdict is ob
tionable. [Whether such an instruction would of itself work
versal in this case, not determined.] *Worachek v. New Denm*
M. H. F. Ins. Co.

3. If a special verdict is to be rendered, the instructions appropriat
each question, whether asked by the parties or given by the c
of its own motion, should be submitted to the jury in immed
connection with the questions to which they are respectively
plicable. *McDermott v. Jackson,*

4. Same point. *Schaidler v. C. & N. W. R. Co.*

5. The submission of a general verdict in connection with a spe
verdict, and the giving of a lengthy charge to the jury ther
some portions of which were applicable to the special question
erroneous. *I*

6. Same point. *Ward v. C., M. & St. P. R. Co.*

INSURANCE.

Foreign accident companies: License fees.

1. The annual license fee of $300, required by sec. 1220, R. S. 1878, to be paid by foreign accident insurance companies desiring to do business in this state, is levied upon the business transacted, and not upon the companies transacting the business. Ch. 105, Laws of 1880, was simply an amendment, which added to the fee previously required a payment of two per cent. upon the gross income received upon accident insurance business during the preceding year. *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, and 99 Wis. 367, followed. *State ex rel. Fidelity & Casualty Co. v. Fricke*, 107

2. From 1880 to 1897 a foreign accident insurance company was licensed to transact business in this state without paying the $300 license fee required by sec. 1220, R. S. 1878. As a condition for renewing its license for 1898, the insurance commissioner required it to pay $300 for each year it had so transacted business, with interest from the time it became due. *Held*, that since the company's right to transact business in this state is a matter of privilege, and the legislature has authorized the commissioner to revoke a license for past violations, or withhold a license until the company has complied with all legal requirements, a writ of *mandamus* to compel the issuance of the license without the payment of said arrearages was properly refused. *Ibid.*

3. The fact that the statute of limitations may have run as to part of said arrearages would not prevent the commissioner from requiring payment of that part as a condition of the issuance of a new license; nor would the fact that no demand for arrearages was made until November, 1897, render the claim so stale that interest should not be allowed. *Ibid.*

[4. Whether a foreign corporation doing business in this state under legislative authority may, in a proper case, take advantage of the statute of limitations, not determined.] *Ibid.*

5. The statute not being doubtful or ambiguous, the mere silence of the state officials, or their neglect to enforce the plain requirements of the law, is not sufficient to relieve the companies from their obligations, on the ground of practical construction. *Ibid.*

6. A company transacting only the business of insuring plate glass against injury from causes other than fire or lightning is an accident insurance company, within the meaning of our statutes regulating the business of insurance, and as such was required to pay, for the privilege of doing business in this state, an annual license fee of $300 under sec. 1220, R. S. 1878, as well as two per cent. on its gross premiums received in this state, under ch. 105, Laws of 1880. *State ex rel. Metropolitan P. G. Ins. Co. v. Fricke*, 117

Life insurance: Permanent disability: "Due proof."

7. In an action on an insurance contract to recover for an incurable disability permanently incapacitating the assured to perform manual labor, where the complaint alleged paralysis as the cause of such disability, it was proper to permit an amendment alleging disease of the heart and nervous system as additional causes, although the claim filed with the insurer had stated the cause of the disability as paralysis only, and the contract barred all claims not filed within six months of the maturity of the contract. *Jarvis v. N. W. Mut. Relief Asso.* 546

8. "Due proof" of a claim, required by an insurance contract, means such a statement of facts, reasonably verified, as, if established in court, would *prima facie* require payment of the claim; and the statement of one adequate fact in the proofs will not exclude others omitted through mistake or ignorance. *Ibid.*

Fire insurance.

9. Prior to the enactment of ch. 387, Laws of 1895, the issuance of an insurance policy by an agent with full knowledge of the existence of an incumbrance on the property was a waiver of a condition in the policy against incumbrances, even though the policy provided that such waivers must be in writing. *Hobkirk v. Phœnix Ins. Co.* 13

10. Where such a condition has been so waived a recovery may be had on the policy without its being reformed to express the consent of the company to the incumbrance. *Ibid.*

11. Under ch. 195, Laws of 1891, the insurance commissioner prescribed a form for fire insurance policies, to be known as the Wisconsin standard policy, in which was a clause requiring the insured, in case of loss, to furnish a certificate of the magistrate or notary public (not interested in the claim, etc.) living nearest the place of the fire. Ch. 124, Laws of 1893, provided that whenever a certificate of a magistrate or notary should be required under a policy it should be a sufficient compliance on the part of the assured to furnish a certificate of any magistrate or notary residing in the county, not interested, etc. Afterwards, the act of 1891 having been held invalid, the legislature by ch. 387, Laws of 1895, prescribed as the Wisconsin standard policy the form previously prescribed by the insurance commissioner. The act of 1895 repealed all acts conflicting therewith, but did not undertake to revise the law on the subject of insurance. *Held*, that the act of 1893 was not repealed or modified, and that, notwithstanding the standard policy required a certificate from the nearest magistrate or notary, a certificate from any magistrate or notary in the county was sufficient. *Vorous v. Phenix Ins. Co.* 76

12. The knowledge or information on the part of the insurer, at the time of issuing a policy, which will operate as a waiver of a condition therein must be knowledge of an existing fact or condition of things, and not a mere statement by the insured of an intention to do some act in the future contrary to such condition of the policy. Thus, the fact that the agent of a township mutual fire insurance company, at the time he wrote a policy covering household goods, saw a portable engine near the house, and was informed by the insured that it was intended for use in the future where it stood, did not constitute a waiver of a provision in the policy against the insurance of property located within 200 feet of any steam power, at least unless the engine was apparently permanently located in its position and so attached or capable of attachment to machinery that it would be apparent to the agent that it was customarily used in that place. *Worachek v. New Denmark M. H. F. Ins. Co.* 81

13. A policy of insurance on a building and contents, the premium being distributed part to each species of property, is a single, indivisible contract, and under a general forfeiture clause in the policy, if one part of the risk be affected, the entire risk is affected. What bars a remedy on the policy as to one part of the property, bars the remedy as to all. *Worachek v. New Denmark M. H. F. Ins. Co.* 88

14. If a policy of insurance cover a building and contents, and the entire property be destroyed by fire, and the policy contain a clause forfeiting all claims thereunder and barring all remedies thereon in case of any false swearing in regard to the loss, and there be such false swearing, which does, or is liable to, prejudice the insurance company as to any part of the property destroyed, the effect is to forfeit the entire loss. *Ibid.*

15. In an action upon a premium note given in consideration of a policy of insurance, the insured cannot defeat a recovery on the ground that conditions in the policy respecting the ownership of the premises and the use of benzine thereon had been broken, unless the breaches would have defeated a recovery on the policy in case of loss. *Davis v. Pioneer Furniture Co.* 394

16. A policy insuring buildings as a furniture factory, though containing a condition avoiding it in case benzine be kept, used, or allowed on the premises, is not vitiated by such keeping and use of benzine on the premises as is customary and necessary in manufacturing furniture. *Ibid.*

17. The owner of an estate in fee upon condition subsequent was in possession with no condition broken, and there had also been deposited in escrow an absolute deed in fee simple to be delivered upon performance of the condition. *Held*, that he was the sole and unconditional owner of the property within the meaning of a condition in a policy of insurance avoiding it in case the insured was not the sole and unconditional owner. *Ibid.*

18. In an action on an insurance policy which the insurer claimed had been rendered void by the giving of a chattel mortgage on the property insured, the mortgagee's attorney testified that he asked the insured for a mortgage until he received notice of the entry of a judgment against her; and the insured testified that the attorney "asked if I was willing to have this mortgage executed for a few days, until the judgment was entered, when it should be null and void, and I told him I was." The mortgage was at once filed, but the note which it secured was never returned, although it was ascertained after a day or two that the judgment had been entered before the mortgage was given. *Held*, that the evidence would not sustain a finding that the mortgage was not to go into effect if the judgment had already been entered. *Thorne v. Ætna Ins. Co.* 593

INTEREST. See BILLS AND NOTES, 7. INSURANCE, 2, 3. OFFICERS, 4.

INTERLINEATION in note. See BILLS AND NOTES, 1, 2.

JOINDER.
Of claims. See TAX TITLES, 5.
Of parties. See MORTGAGES, 1.

JOINT DEBTORS. See BILLS AND NOTES, 5.

JUDGMENT.

Without verdict or findings. See APPEAL, 8.

1. Where one party to an action is, on the evidence, entitled to judgment as a matter of law, the taking of a verdict in his favor is an immaterial formality; hence if, in such circumstances, the case be submitted to a jury who fail to agree, the court may then discharge them and order judgment in accordance with the facts. *Calteaux v. Mueller,* 525

When entered: Proceedings after filing of decision.

2. Upon the filing of a decision and order for judgment in an equity case, in or out of term, judgment may be entered accordingly without any further proceedings in the cause. *Adams v. Rodman,* 456

Effect as evidence: Mental condition.

3. An adjudication of mental unsoundness *per se* is evidence only of the mental condition of the subject at the time of such adjudication, and thereafter upon the theory that a condition of mind once shown to exist is presumed to continue. *Small v. Champeny,* 61

4. An instruction that an adjudication of mental unsoundness may relate back presumptively to a prior date, as evidence of the mental condition at such date, *held* error. *Ibid.*

5. When the condition of mind of a person is shown to have been the same for a considerable period of time, an adjudication as to such condition at one date during the period is competent evidence when the act claimed to have been affected by such condition occurred at a prior date, upon the theory that it is reasonable to say that appearances determined at one time during the period to indicate insanity or incompetency, indicate the same at other times during such period, whether before or after the adjudication. *Ibid.*

For deficiency: Parties. See MORTGAGES, 1.

Validity: Jurisdiction: Status of nonresidents. See WILLS, 6.

Foreign judgment: Credit and effect to be given it.

6. An order or judgment of a Louisiana court appointing an administrator of the estate or succession of a deceased person, though based on a petition alleging that the deceased died while a resident of that state and that he left property within the jurisdiction of the court, is not conclusive as to the domicile of the deceased and does not, under sec. 1, art. IV, Const. of U. S. (requiring full faith and credit to be given in each state to the judicial proceedings of every other state), preclude a Wisconsin court from taking jurisdiction of a proceeding to probate a will of the deceased and administering so much of his estate as was actually located in Wisconsin. *Frame v. Thormann,* 653

Relief against judgment: Bill of review, etc.

7. The Code was intended to be a complete system in itself, and a complete substitute for the old forms of action and methods of practice. Under it the old bill of review does not exist, but relief against a judgment obtained against a party through his mistake, inadvertence, surprise, or excusable neglect may be granted on motion within one year after notice, or a motion for a new trial may be made on the ground of newly discovered evidence at any time within one year after verdict or finding; but if the discovery is not made within the year, there is no remedy unless the facts discovered show fraud or collusion, in which case relief may be obtained in a direct action. *Crowns v. Forest Land Co.* 97

8. No leave of court is necessary before commencing such an action. *Ibid.*

Setting aside and vacating. See SURETYSHIP.

Effect of writ of certiorari. See CERTIORARI.

What judgments reviewable on writ of error. See APPEAL, 1.

From what appeal may be taken: "Amount involved." See APPEAL, 2.

Reversal on appeal. See APPEAL, *Affirmance and reversal.*

Modification and affirmance on appeal. See APPEAL, 22.

JUDICIAL SALES. See EXECUTIONS.

JURISDICTION. See APPEAL, 1-3. CRIMINAL LAW, 1. JUDGMENT, 6. NUISANCES. RECEIVERS, 2. TELEPHONE COMPANIES, 4.

JURORS.

The statute providing for the selection of names of jurors by jury commissioners is not invalid because it curtails the right which supervisors formerly had to furnish a jury list. *Butler v. State*, 364

JUSTICES' COURTS. See CRIMINAL LAW, 1.

LACHES. See EQUITY, 1, 8. HIGHWAYS, 2. OFFICERS, 3.

LAND CONTRACT. See EQUITY, 9, 10.

LEGITIMACY of children. See WILLS, 5, 6.

LICENSE: Foreign insurance companies. See INSURANCE, 1-6.

LICENSE to use track as footway. See RAILROADS, 15.

LIENS.

Of mechanics, etc., for labor and materials. See PARTNERSHIP, 7, 8.

1. A right to a mechanic's lien can be assigned only under the limitations and conditions prescribed in sec. 3316, Stats. 1898, and is waived by an assignment not complying with that section. *Shearer v. Browne*, 585

On logs and timber.

2. A claim for damages for breach of a contract of employment is not a lienable claim under sec. 3329, R. S. 1878. *Kennedy v. South Shore L. Co.* 284

Of vendor of land. See EQUITY, 7.

LIMITATION OF ACTIONS.

See CONSTITUTIONAL LAW, 2. INSURANCE, 3-5. TAX TITLES, 1.

1. A statutory condition in the nature of a limitation upon the enforcement of a common-law right, such as the right of recovery for injuries to an employee attributable to actionable negligence of the master, is a statute of limitations and does not apply to rights existing at the time of its passage, as to which a reasonable time is not left after such passage to comply with such condition. *Relyea v. Tomahawk P. & P. Co.* 301

2. A statute of limitations in existence at the time of the commencement of an action applies to it in the absence of anything in the act, or any other law, to the contrary. *Ibid.*

3. If a statute of limitations does not recognize existing rights and provide a reasonable time for their enforcement, it is void as to them under the inhibition of the national constitution as to laws impairing the obligations of contracts or taking property without due process of law. *Ibid.*

4. If, in a statute of limitations, a time be allowed for the enforcement of existing rights regardless of it, that time will be deemed conclusively reasonable unless the contrary appears beyond a reasonable doubt. *Ibid.*

5. If, in a new statute of limitations, a time be not allowed for the enforcement of existing rights regardless of such statute, it will not

apply to such rights, unless the time left for the enforcement thereof, by the situation of the parties, judicially appears reasonable, which determination must be made having regard to the facts of each case. *Ibid.*

6. A statute creating a condition precedent to the enforcement of the common-law right to damages for bodily injuries attributable to actionable negligence, containing no saving clause as to existing claims of that character, in effect extinguishing a claim as to which the new conditions shall not have been complied with before the expiration of a year after the injury, does not apply to the claim of a minor existing at the time the new statute went into effect, who had but sixty-one days thereafter within which to comply with it. *Ibid.*

LIQUIDATED DAMAGES. See MASTER AND SERVANT, 4.

LOGS AND TIMBER.

See CONTRACTS, 5. LIENS, 2. SALE OF CHATTELS, 10, 11.

1. A contract for the sale of logs provided that they should be scaled by a scaler mutually agreed upon or, in default of such agreement, a scaler appointed by a certain third person, and that if the scale of any person selected under the contract to make such scale should prove unsatisfactory to either party, then such party should have the right to insist upon a change of scalers, and a new scaler should be appointed. Pursuant to the contract plaintiff was appointed as scaler by such third person and acted as such until the vendee, being dissatisfied, notified him to discontinue work. The vendors, however, declined to consent to a change, and under their direction plaintiff held himself in readiness for several months to scale the logs, but the vendee did not permit any logs to be scaled during that time. *Held*, that plaintiff's right of action, if any, was not for wages earned, but for damages for breach of the contract of employment, and that the damages should be limited to the value of the time it would ordinarily have taken to scale the logs in the general course of business. *Kennedy v. South Shore L. Co.* 284

2. Under such contract of sale the vendee had the right to discharge plaintiff without the vendors' consent, either party having the right to insist upon a change of scalers when dissatisfied with one previously appointed, whether he was appointed by mutual agreement or by the third person mentioned. *Ibid.*

3. A written contract for the cutting of pine timber, requiring that it be cut "in a workmanlike manner," refers to the customary manner of cutting such timber at the place of the contract, and prior conversations as to the method of doing such work elsewhere cannot be considered as forming any part of the agreement evidenced by the writing. *Shores Lumber Co. v. Stitt,* 450

MANDAMUS. See INSURANCE, 2. TELEPHONE COMPANIES, 4.

MARRIAGE AND DIVORCE. See CONFLICT OF LAWS. DIVORCE.

MASTER AND SERVANT.

Contract of employment: Breach: Remedies. See LIENS, 2. LOGS AND TIMBER, 1, 2.

1. No recovery can be had for services under an entire contract where the employee voluntarily abandons the work, without valid excuse, before the end of the stipulated time. *Walsh v. Fisher,* 172

2. In an action to recover for the services of an employee who had quit work in breach of his contract, the evidence would have justified a finding either that he quit pursuant to an agreement with others to strike or that he quit because of a justifiable fear of bodily violence from the strikers. The court was asked to instruct that if he left for the former reason there could be no recovery. *Held*, that it was error to modify such instruction by adding the words: "That is, if that was the reason he quit, and the danger or apparent danger was not such that a man of ordinary nerve would have refused to go on with the work, your verdict will be for defendants." *Ibid.*

3. One employed for a stipulated time, if excused in leaving sooner by reason of threats of strikers to do him bodily harm, can recover only the value of his services after deducting the damages, if any, suffered by the employer by reason of the breach of the entire contract. *Ibid.*

4. Contractors for the loading and unloading of vessels and cars upon docks, who had given bond for prompt performance, stipulated in a written agreement with their employees that for a breach of such agreement by the latter in quitting the service the employer might retain, as liquidated damages, any wages then earned by the employee quitting, not exceeding fifteen days' wages in all. *Held*, that such stipulation was justified, and that the amount so to be retained should be regarded as liquidated damages and not a penalty. *Ibid.*

Injuries to servants: Negligence, etc. See LIMITATION OF ACTIONS, 1, 6. RAILROADS, 16–21. VERDICT, 6.

5. While attempting to remove, with the aid of an iron hook, a blockade of timbers and slabs upon a roller bench in a sawmill, a slab sawyer was injured through the slipping of his hook from a timber, causing him to step back so as to come in contact with the slab saw. The blockade was caused by a short slab — too short to be carried over the rollers — upon which other timbers lodged. The employer had promised to put two additional live rollers in the bench, which would have moved the timbers further along the bench, but would not have prevented a blockade such as that in question. *Held*, that the failure to furnish such additional rollers, not being the producing cause of the blockade, did not render the employer liable for the injuries. *Olson v. Doherty L. Co.* 264

6. The hook with which the plaintiff was attempting to remove the timbers being a simple contrivance, easily comprehended, as to all the dangers of its use, by any person of ordinary intelligence, and being entirely in plaintiff's care, he assumed the risk, if any, arising from the fact that its end was straight instead of curved and was not sharp. *Ibid.*

7. In an action for personal injuries, plaintiff's testimony tended to prove that he was employed by defendant to haul tan bark with a bob-sled over a private way of defendant, in which was a hole about eighteen inches deep, one and one-half feet wide, and three feet long, situated at the foot of a hill rising about eleven feet in a distance of 105 feet; that while plaintiff, sitting on a load of bark not confined on the rack nor bound on in any way, with the soles of his boots even with the front end of the load, and nothing for his feet to brace against, was descending such hill, the front bob was precipitated into the hole, and plaintiff thrown off the load and injured; that plaintiff knew of the defect in the road, had passed over it on preceding days from eleven to thirteen times,

and, on the evening before the accident, had notified defendant's foreman of the defect and of his purpose to quit unless the defect was repaired; that thereupon the foreman had promised him that the defect should be repaired before he came out over the road the next morning; that plaintiff passed the place the next morning at 7 o'clock and noticed that the defect had not been repaired, but on his return with a load did not ascertain whether the defendant had redeemed his promise, but drove over the defective way and was injured. Defendant's witnesses denied the existence of the defect. *Held*, that it was error to direct a verdict for defendant. *Nelson v. Shaw*, 274

8. If defendant expressly promised to repair the defect before plaintiff returned with his load, the plaintiff under the circumstances was not precluded by any rule of law from relying on such promise. *Ibid.*

9. The testimony did not show that the defect was so imminently dangerous as to make it contributory negligence *as a matter of law* for the plaintiff to drive down the hill without first ascertaining whether the defendant had redeemed his promise to repair. *Ibid.*

10. Whether plaintiff, in driving down the hill while sitting on the load as above stated, was guilty of such contributory negligence as would defeat his claim, was a question for the jury. *Ibid.*

11. In an action for injuries sustained by an employee in a sawmill while attempting to clear away accumulated sawdust by punching it through a hole left for that purpose in the floor beneath an edger, it appeared that he was twenty-nine years of age, and had worked in the mill two years as a common laborer, and thereafter for some months had been running a "little trimmer" and had occasionally taken the place of an edgerman for a few minutes; that at the time of the injury he was at work on the edger, but had never seen the accumulated sawdust cleared away; that the saws were uncovered and making 2,500 revolutions a minute; and that, while standing above them and trying to remove the dust with a stick four to six feet long, it was caught and thrown violently upward, breaking his jaw. *Held*, that the danger was obvious and he was guilty of contributory negligence. *Foss v. Bigelow*, 413

12. An intelligent boy, fifteen years old, familiar with the operation of a machine of which he had charge in a pulp mill, with nothing to distract his attention, in attempting to straighten a wrinkle in a strip of felt running between rollers grasped the felt so near to the rollers that they caught and crushed his fingers. *Held*, that the danger was obvious and the boy guilty of contributory negligence. *Bigelow v. Danielson*, 470

13. A question in the special verdict, "Was the want of ordinary care and prudence on the part of the plaintiff the proximate cause of his injury?" was objectionable, the real inquiry being, Did such want of ordinary care and prudence *contribute* to produce the injury? *Ibid.*

14. An instruction to the jury that "proximate cause means the nearest cause; direct or immediate cause, in contradistinction to the indirect or remote cause," *held* erroneous. *Ibid.*

MAXIMS.

Electio semel facta non patitur regressum, 646.
Noscitur a sociis, 155, 156, 171.
Stare decisis, 382.

MEASURE OF DAMAGES. See DAMAGES. LOGS AND TIMBER, 1. MASTER AND SERVANT, 3, 4. RAILROADS, 2, 3, 12. REGISTER OF DEEDS. SALE OF CHATTELS, 10, 11.

MECHANICS' LIENS. See LIENS, 1. PARTNERSHIP, 7, 8.

MINORS. See LIMITATION OF ACTIONS, 6. MASTER AND SERVANT, 12.

MISTAKE. See EQUITY, 1, 2. INSURANCE, 8. JUDGMENT, 7. MORTGAGES, 3.

MISTAKES of public officers. See ESTOPPEL, 3, 4. REGISTER OF DEEDS.

MORTGAGES.

Of land. See ACTION, 9. BILLS AND NOTES, 6. CONTRACTS, 3. PUBLIC LANDS. REGISTER OF DEEDS.

1. Under sec. 3156, Stats. 1898 (authorizing a deficiency judgment, in a foreclosure action, "against every party personally liable for the debt secured by the mortgage, whether the mortgagor or other persons, if upon the same contract which the mortgage is given to secure"), the indorsers of a note, whose liability has been duly fixed by demand and notice, may be joined in an action to foreclose the mortgage given by the maker as security, and a deficiency judgment may be rendered against them therein. *Cottrell v. New London F. Co.* 94 Wis. 176, distinguished. *Halbach v. Tester,* 530
2. A finding of the trial court that a deed absolute in form was intended as an absolute conveyance and not as a conveyance by way of security is *held* to be against the clear preponderance of the evidence. *Schierl v. Newburg,* 552
3. Findings of the trial court that there was a mistake in the condition of a mortgage, and also in the description of the premises covered by it, are *held* not to be against the preponderance of the evidence in this case, even applying the rule that such mistake must be shown beyond reasonable controversy. *Burmeister v. Olson,* 677

Of chattels. See FRAUDULENT CONVEYANCES, 2, 3. GARNISHMENT, 2. INSURANCE, 18. PARTNERSHIP, 4. VOLUNTARY ASSIGNMENT, 5.

MUNICIPAL CORPORATIONS.

Officers: Failure to act: Right of taxpayers to enforce corporate rights.

1. When the officers of a public corporation, upon whom the duty devolves of appealing to the courts to protect its rights, refuse to put the necessary judicial machinery in motion upon demand being made therefor by a taxpaying member of such corporation acting for himself and all other such persons, or the circumstances are such as to obviously render such demand useless, such taxpayer may, so acting, take the place of such public officers for the purpose of enforcing the corporate rights. *Mulberger v. Beurhaus,* 1
2. If a public corporation be aggrieved by a determination of a county court as to a matter pending before it, and the proper officers of such corporation refuse or neglect to appeal from such determination to the circuit court for relief, a taxpaying member of such corporation, acting as before indicated, may intervene and take the appeal. *Ibid.*
3. The test of the right of appeal in the circumstances stated above is not whether the taxpayer is directly injured by the determination

of the county court, but whether the corporation as a whole is injured or aggrieved in a matter in which the individual members of the corporation have a substantial interest. *Ibid.*

Officers: Mistakes: Estoppel. See ESTOPPEL, 3, 4.

Plats: Dedication of streets, etc.: Acceptance. See PLAT OF LANDS.

Use of streets by telephone companies: Regulation. See TELEPHONE COMPANIES.

Streets and sidewalks: Injuries from defects. See HIGHWAYS, 6–8.

4. The failure of a city, in constructing a street, to make it reasonably safe for public travel — in this case the improper adjustment of the cover of a manhole over a catch-basin by reason of which such cover slid out of place when stepped on — is not the creation of a nuisance rendering the city liable at common law for injuries caused thereby, but is a failure of duty rendering the city liable under sec. 1339, Stats. 1898, to persons injured by the insufficiency; and the giving of notice as required by that section is a condition precedent to the maintenance of an action. *Ziegler v. West Bend,* 17

5. In an action for injuries sustained by falling on a sidewalk alleged to have been rendered uneven and unsafe by accumulations of ice and snow, it was not sufficient for plaintiff to show such condition of the walk and that while proceeding with care he fell thereon and was hurt, but he should also show that the accident was the result of the defects alleged, especially where it appeared that the whole surface of the country was slippery and icy. *Small v. Prentice,* 256

6. To run over a rough, uneven sidewalk which has been rendered slippery by ice and sleet, with knowledge of such conditions, constitutes contributory negligence. *Ibid.*

7. The presence, in a public street, of a sidewalk largely traveled by the public for some months before an accident thereon, rendered the town responsible for its defects, although it was originally constructed by a private individual and for private use. *McHugh v. Minocqua,* 291

8. Knowledge on the part of the proper authorities of the generally defective and rotten condition of a sidewalk does not charge them with notice of a specific defect alleged to have caused an injury, where such specific defect was of a different kind and in no way connected with the generally defective condition. *Ibid.*

9. If, in this case, the defect causing plaintiff's injury was a part of or included in the generally defective condition of the sidewalk, it was a question for the jury whether, in view of his familiarity with such condition, he was not guilty of contributory negligence in failing to exercise greater precaution against injury thereby. *Ibid.*

NEGLIGENCE.

See HIGHWAYS, 6, 7. MASTER AND SERVANT, 5–14. MUNICIPAL CORPORATIONS, 4–9. RAILROADS, 4–23.

In all cases where the right of recovery is based upon negligence not wilful nor such that the person injured was deceived or misled by the negligent act complained of, the plaintiff, in order to recover, must himself have exercised care, no matter how clear the negligence of the defendant. *White v. C. & N. W. R. Co.* 489

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. MORTGAGES, 1. PLEDGES.

NEW TRIAL. See PRACTICE, 1.

NONSUIT. See COURT AND JURY. RAILROADS, 14.

NOTICE.
Of claim for money borrowed by agent without authority. See AGENCY, 3.
Of assignment of part of claim. See ASSIGNMENT, 2, 4.
Of nonpayment, to indorser. See BILLS AND NOTES, 11.
Of entry of judgment or order. See CERTIORARI.
Of defects in warranted machinery. See CONTRACTS, 9. VERDICT, 1.
Of misappropriation of funds, to pledgee. See ESTATES OF DECEDENTS, 1, 2.
Mailing of notice: Presumption as to its receipt. See EVIDENCE, 11.
Of fraud. See FINDINGS OF FACT.
Of defects in highways, etc. See HIGHWAYS, 6. MUNICIPAL CORPORATIONS, 8.
Of injury. See HIGHWAYS, 8. MUNICIPAL CORPORATIONS, 4.
Of washout. See RAILROADS, 19.
Of killing of animals. See RAILROADS, 22.

NUISANCES.

See APPEAL, 8. MUNICIPAL CORPORATIONS, 4.

An action in the circuit court to enjoin the continuance of a public nuisance must be instituted by the proper law officer of the state, and that court has no power to authorize a private relator to act *pro hac vice* as such officer. *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, distinguished. *State ex rel. Hartung v. Milwaukee*, 509

OFFICIAL BONDS. See REGISTER OF DEEDS.

OFFICERS.

Injunction against payments for illegal purposes: Recovery of moneys paid. See HIGHWAYS, 3–5.

1. A taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out the public money for illegal purposes, and may also, under the proper circumstances, compel public officers and even third persons to repay into the public treasury money already paid out illegally. *Webster v. Douglas Co.* 181
2. Moneys paid out by public officers in direct violation of law may be recovered from the officials themselves and from the recipients thereof, in actions seasonably brought by taxpayers on behalf of the public, especially where the transaction is marked by haste, fraud, collusion, or concealment. *Ibid.*
3. But a court of equity will not, in such an action, require repayment from one who, for a valuable consideration and in good faith, had purchased county warrants issued in payment for work done under illegal contracts, where, notwithstanding the public nature of the proceedings and of the work, the action was not brought until after a large part of the work had been done and the warrants in question had been issued and paid. *Ibid.*
4. Where, at the suit of taxpayers, public officers and contractors are held liable to repay moneys illegally obtained from the public treas-

ury, they should be charged, also, with interest from the time such moneys were unlawfully drawn out. *Ibid.*

5. In an action by taxpayers to restrain public officers from paying out public moneys illegally and to compel repayment of moneys already so paid out, it is *held* that costs should be allowed upon final judgment against the defendants. *Ibid.*

Refusal or neglect to bring suit, etc.: When taxpayers may act. See MUNICIPAL CORPORATIONS, 3–5. NUISANCES. OFFICERS, 1, 2.

Violation of injunction. See HIGHWAYS, 3–5.

Mistakes of officers: Estoppel. See ESTOPPEL, 3, 4.

Practical construction of statutes by officers. See INSURANCE, 5.

County officers. See HIGHWAYS, 3–5.

Sheriff: Conclusiveness of return. See VOLUNTARY ASSIGNMENT, 3.

Clerk of circuit court. See TERMS OF COURT.

Register of deeds: Failure to index mortgage. See REGISTER OF DEEDS.

City officers. See MUNICIPAL CORPORATIONS, 3–5. TELEPHONE COMPANIES, 3, 4.

School officers. See COMMON SCHOOLS.

Of corporations: Powers. See CORPORATIONS. UNIVERSITY OF WISCONSIN.

OPINIONS. See EVIDENCE, 8, 10. RAILROADS, 11.

PARENT AND CHILD: Legitimacy. See WILLS, 5, 6.

PARTIES. See APPEAL, 3. ESTATES OF DECEDENTS, 5. EVIDENCE, 7. MORTGAGES, 1. MUNICIPAL CORPORATIONS, 1–3. NUISANCES. OFFICERS, 1, 2. PLEADING, 4. WILLS, 2.

PARTNERSHIP.

See GARNISHMENT, 2.

1. MARSHALL, J., is of the opinion that a conveyance of firm assets by the members of an insolvent partnership, to pay the individual indebtedness of one of its members, and without any other purpose, is not void as to partnership creditors. *Excelsior Mill Co. v. Hanover,* 309

2. The partnership relation existing between a dormant partner and the ostensible proprietor of a business, under an agreement treating the property as belonging to the latter and providing that he should repay the amount which the former had invested in the business, with interest and a share of the net profits, was dissolved by the death of the active partner, in whose possession all the partnership assets then were; and the business was thereafter carried on by his administrators in the name of the estate, with the knowledge and consent of the former dormant partner, who did not take possession or control as survivor or constitute said administrators his agents to continue the business. Afterwards said dormant partner brought suit to foreclose a mortgage which had been given to him by the active partner to secure the repayment of the amount invested by the dormant partner in the business. *Held,* that in such action the dormant partner was not chargeable with any part of the losses incurred in the business after the dissolution. *Stubbings v. O'Connor,* 352

3. Where partners have by agreement used certificates of stock to indicate the proportionate interest of each in the firm, a transferee of

such certificates does not become a member of the firm, in the absence of an agreement to that effect, but obtains merely the right to demand an accounting and to receive the proportionate share of the net firm property after such accounting. *Rommerdahl v. Jackson*, 444

4. A transfer, as collateral security, of certificates of stock used by partners to indicate the proportionate interest of each in the firm is not a chattel mortgage within the meaning of sec. 2313, Stats. 1898, providing for the filing of such mortgages. That statute applies only where the mortgaged property is capable of manual delivery. *Ibid.*

5. A partner whose interest in the firm was indicated by certificates of stock assigned such certificates, either absolutely or as collateral security, to various persons. Afterwards, by bill of sale, he transferred his apparent interest in the partnership to an innocent purchaser, promising to deliver the certificates in a few days, the consideration to be paid on their delivery; and the purchaser took possession of the seller's interest. Before the consideration was paid a creditor of the seller garnished the purchaser, and she brought the agreed price into court. The assignees of the certificates were interpleaded, and each answered claiming a share of said fund. *Held*, that this constituted a ratification by said assignees of the transfer to the garnishee, and an election to consider the money as standing in place of their interests or rights in the firm assets. The rights of all parties might therefore be properly adjusted in the garnishment action without an accounting. *Ibid.*

6. A member of a going partnership who was under no obligation to contribute further to the capital of the firm received money as guardian and it was used in carrying on the firm business, all the partners consenting. *Held*, that liability to return the money to the wards became a partnership debt as fully and absolutely as though the money had been borrowed from a third party. *German American Bank v. Magill*, 582

7. Where the materials for which a lien is claimed were furnished by one who, as surviving partner, was carrying on the business formerly conducted by a firm, the debt is due to him individually, and he may assign the claim as if there had never been any partnership. *Shearer v. Browne*, 585

8. No interest in such debt or right to a lien is conveyed by an administrator's sale of the interest of the deceased partner in the firm, but merely a right to share in the net proceeds of the assets of the business when it is closed up. *Ibid.*

PAYMENT.
Extension of time. See BILLS AND NOTES, 3–5.
To unauthorized person. See BILLS AND NOTES, 6.
By note. See BILLS AND NOTES, 10, 12.
Application. See PLEDGES.

PENALTY or liquidated damages? See MASTER AND SERVANT, 4.

PHYSICIANS AND SURGEONS. See EVIDENCE, 6.

PLAT OF LANDS.

1. On the recorded plat of an unincorporated village, at the easterly end of a street running a little north of east, a triangular piece of ground was left uninclosed, within the limits of the plat but ad-

joining a quarter-section line which was its northern boundary. All parallel streets were left open at their easterly ends, indicating an intention to have them connect with the streets of additions to be made on that side; and for that purpose the triangle in question would be necessary. *Held*, that the triangle was dedicated as part of the street. *McHugh v. Minocqua*, 291

2. A resolution of the town board ordering such street to be opened up for traffic to its easterly end, followed by working of portions thereof, constituted an acceptance by the town of that street, including the triangle. *Ibid.*

PLEADING.

See ACTION, 2, 9. CRIMINAL LAW, 1. EQUITY, 5, 6, 10. INSURANCE, 7.

1. A plaintiff who, at the trial, bases his claim on facts different from those alleged in his complaint, thereby opening the door to an inquiry respecting such facts, cannot complain that the issue so tried was not within the pleadings. *Williams v. Williams*, 246

2. In a tort action for the conversion of money it is *held* not to have been an abuse of discretion to allow defendants to amend their answer during the trial so as to allege that in a former action (which had been dismissed because plaintiff declined to bring in another defendant) plaintiff had sought, with full knowledge of the facts, to recover the identical sum of money upon an implied contract as for money had and received, and had thereby waived the tort,—it appearing, among other things, that plaintiff had greatly delayed the prosecution of the tort action, that an order dismissing it for want of prosecution had been set aside as a matter of favor to him, and that the amendment could not operate as a surprise. *Carroll v. Fethers*, 436

3. In an action for the wrongful conversion of money, under an answer denying such conversion, the record of a former action brought by plaintiff to recover the same money upon an implied contract as for money had and received was admissible to show that the conversion had been waived. *Ibid.*

4. A plea of the pendency of an action previously commenced to enforce the same cause of action, is not good unless it shows that the parties thereto are identical with those in the second action, or that such as are not identical are in privity with the former parties. *Calteaux v. Mueller*, 525

PLEDGES AND COLLATERAL SECURITY.

See ESTATES OF DECEDENTS, 1, 2. PARTNERSHIP, 4, 5.

One T., with whom a note indorsed in blank had been deposited for safe-keeping, borrowed money from plaintiff and gave him said note as collateral security, the plaintiff receiving the same in good faith, with no knowledge of any defect in T.'s title thereto. When said note became due the other collaterals in plaintiff's hands were sufficient in value to discharge T.'s indebtedness to him, but it had not been discharged. Sometime later T. borrowed a further sum from plaintiff, agreeing that all the collaterals then in the plaintiff's hands should be held as security for it as well as for the prior debt. Subsequently the makers paid to T. the amount of the note and took a receipt, T. claiming that the note had been mislaid and

promising to send it when found. T. became insolvent, and the collaterals were insufficient to pay his indebtedness to plaintiff. *Held*, that plaintiff might apply the other collaterals to the payment of the second loan to T., and hold the note in question to secure the first, for which it was pledged before its maturity. *Strong v. Bowes*, 542

POSSESSION of land. See ADVERSE POSSESSION. EJECTMENT.

PRACTICE.

See ACTION. AGENCY, 2. APPEAL AND ERROR. CERTIORARI. COSTS. COURT AND JURY. CRIMINAL LAW AND PRACTICE. EVIDENCE. EXECUTIONS. GARNISHMENT, 3, 4. INSOLVENCY. INSTRUCTIONS TO JURY. JUDGMENT. JURORS. NUISANCES. PLEADING. RECEIVERS. TAX TITLES, 5. TERMS OF COURT. VERDICT. VOLUNTARY ASSIGNMENT, 2.

1. A motion to set aside a verdict and grant a new trial should state the grounds of the motion, and the record should show that it was made at the same term at which the trial was had. *Williams v. Williams*, 246
2. Where a cause is tried by the court and a jury is impaneled for the purposes of an advisory verdict, and the cause is fully tried and submitted, neither party is entitled to a hearing as a matter of right after the coming in of the special verdict and before the findings by the court are filed. [WINSLOW, J., is of the opinion that after the rendition of such a verdict an opportunity should be given for a hearing and for the defeated party to move for findings and judgment notwithstanding the verdict.] *Adams v. Rodman*, 456

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 1.

PRESCRIPTION. See ADVERSE POSSESSION.

PRESUMPTIONS. See APPEAL, 13–15. BILLS AND NOTES, 1, 2, 9, 10. EVIDENCE, 11. FRAUD, 1, 4. JUDGMENT, 3–5. TAX TITLES, 2. WILLS, 4.

PRINCIPAL AND AGENT. See AGENCY.

PRINCIPAL AND SURETY. See SURETYSHIP.

PRINTED CASE. See APPEAL, 23.

PRIVILEGED COMMUNICATIONS. See EVIDENCE, 6.

PROMISSORY NOTES. See BILLS AND NOTES. MORTGAGES, 1. PLEDGES. SALE OF CHATTELS, 3, 4.

PROXIMATE CAUSE. See MASTER AND SERVANT, 5, 13, 14. MUNICIPAL CORPORATIONS, 5. RAILROADS, 8, 9, 17. VERDICT, 6.

PUBLIC LANDS.

See ADVERSE POSSESSION, 1. EJECTMENT. SALE OF CHATTELS, 10.

A mortgage given by one who has entered land as a homestead under the federal statutes and has received the final receiver's receipt or certificate is valid as against the mortgagor and those claiming under him, even though given prior to the issue of the patent, if given and received in good faith. *Meinhold v. Walters*, 389

PUBLIC NUISANCES. See NUISANCES.

PUBLIC SCHOOLS. See COMMON SCHOOLS.

RAILROADS.

Sale of logging railroad. See CONTRACTS, 5.

Ejection of passenger from train: Sunday contract: Damages.

1. In an action against a railway company under sec. 1818, R. S. 1878, for a tortious ejection from a train, the fact that the plaintiff claimed to be riding upon a ticket purchased on Sunday is immaterial. *Masterson v. C. & N. W. R. Co.* 571

2. An award of $850 damages for the wrongful ejection of a passenger from a railway train is *held* to be excessive, where he was ejected in the outskirts of a city, without any serious insult being offered by the conductor, and he did not claim to have been made sick or disabled, or to have suffered in any way, except that he was robbed of a small sum, without violence, while walking along the track. *Ibid.*

3. Whether the robbery in such case could form any ground for the recovery of increased damages *seems* doubtful. *Ibid.*

Injuries to passengers: Negligence: Excursion trains: Proximate cause.

4. The plaintiff, a passenger on a freight train, while standing in the caboose, was thrown against the door by a sudden shock of the cars coming together in making a coupling, and was injured. There was evidence tending to show that the parts of the train were brought together with unusual violence, such as could be accounted for only by negligence in the train hands or defective apparatus. *Held* that, although defendant's witnesses fully contradicted any unusual violence, the question of defendant's negligence was one for the jury. *Harden v. C., M. & St. P. R. Co.* 213

5. The question of plaintiff's contributory negligence should also have been submitted to the jury, in view of the evidence in respect to his position and his knowledge that a coupling was soon to be made. *Ibid.*

6. A railway passenger is not, as matter of law, guilty of negligence in standing on the platform of a car, even while it is in motion, if there is no room inside. If on boarding a car he finds it so crowded that he cannot get inside without the use of main force, and concludes to ride upon the platform, the question whether he is guilty of contributory negligence, or has assumed the extraordinary risks of that position, is one for the jury under proper instructions. *Ward v. C., M. & St. P. R. Co.* 215

7. A passenger on an excursion train is entitled to just as much care for his safety as one upon a regular train. In riding upon a crowded train he assumes the inconveniences resulting from its crowded condition, but not any increased risk. *Ibid.*

8. In an action for injuries received by a passenger while standing on the platform of a railway car, a question in the special verdict being as to whether the negligence of defendant's employees in coupling the car was the proximate cause of the injuries, it was error to refuse an instruction, asked by defendant, that the jury must answer such question "No" unless they were satisfied to a reasonable certainty, from the greater weight of evidence, that it should be answered "Yes,"—the substance of such instruction not being given in the general charge. *Ibid.*

9. An instruction to the effect that the expressions "proximate cause" and "direct cause" are equivalent and mean the immediate or inducing cause, was erroneous. *Ibid.*

Injuries to travelers at highway crossings: Gates: Diseased persons: Arguments to jury.

10. The duty of a person approaching a railway track to look and listen before crossing is absolute, and nonobservance of that duty is negligence *per se.* So *held,* in a case where the gates maintained at a railway crossing were open, and plaintiff, while walking across the tracks, was struck by a train running at an unlawful rate of speed, which he might have seen and heard if he had looked and listened before attempting to cross. *Rohde v. C. & N. W. R. Co.* 86 Wis. 309, distinguished. *White v. C. & N. W. R. Co.* 489

11. In an action against a railway company for the death of plaintiff's intestate, which occurred from *diabetes mellitus* thirteen days after a collision at a highway crossing, there was evidence that plaintiff suffered from said disease two years before his death; that it was a chronic disease and usually terminated fatally in from four months to six years, depending on age; but that plaintiff for a year and a half prior to the accident was apparently in a normal state of health. *Held,* that an hypothetical question designed to elicit from witnesses their opinions as to the cause of death, which recited the evidence with reference to the accident but omitted all reference to said disease, was misleading. *Schaidler v. C. & N. W. R. Co.* 564

12. A railway company cannot escape liability for negligence causing death by showing that the person killed was so diseased that his life would necessarily have terminated in a short time in the absence of the accident, but such evidence should be taken into account in assessing the damages. *Ibid.*

13. In such a case statements of plaintiff's counsel in his argument to the jury that "We can show you how many hundred men have come near being killed there, if you want us to;" that "You are called upon to set a price upon a human life;" that "Barriers are erected and watchmen placed at crossings on account of their danger, and in this case, unless the company can show they blew the whistle and rang the bell," it was liable; that "I know of a case in this town of a doctor who treated a little boy, who said the boy must die; but no sooner had he pronounced his death sentence than he got better, in defiance of the doctor's prognostication," are *held* erroneous, where not properly excluded from the consideration of the jury by the trial court. *Ibid.*

Injuries to trespassers on track: License.

14. Plaintiff, a bright, intelligent boy ten years of age, had, with two other boys, been running westward along a railroad track at a place where it was unlawful for them to be. Just before reaching a street he attempted to cross the track and was struck by a locomotive coming from the east at an unlawful speed, the bell on which had not been rung, though its whistle was sounded immediately prior to the accident. The boy knew that it was dangerous to walk along or get upon the track, and had been cautioned by his parents not to go around trains. He testified that although he knew the train came along about that time he had not thought of it until just before he was struck. It appeared that from the street a man could be seen on the track nearly 1,100 feet to the east; but there was no evidence that either of the boys was actually on the track after the train approached where they could be seen from the engine, or that the engineer or fireman saw any of them, or that their clothing was such as naturally to attract at-

tention. In an action for the injuries sustained, *held*, that a nonsuit was properly granted. DODGE and WINSLOW, JJ., dissent, being of the opinion that the question whether defendant's servants were guilty of gross negligence should have been submitted to the jury. *Schug v. C., M. & St. P. R. Co.* 515

15. The fact that a railroad track, at a place where it was protected by fences and cattle-guards and where it was unlawful, under sec. 1811, R. S. 1878, for persons to walk, was frequently used by pedestrians does not show that such use was licensed by the company, in the absence of evidence that it acquiesced in or invited the trespass. *Ibid.*

Injuries to employees.

16. In an action by a locomotive engineer against a railroad company for personal injuries sustained in consequence of a washout at a culvert, it appeared that he was not proceeding with the caution required by the rules of the company in case of sudden and heavy rains or indications of high water, but it did not appear conclusively that he knew that the rains in that vicinity had been so severe or unusual as to call for the exercise of such caution. *Held*, that he was not guilty of contributory negligence as a matter of law. *Crouse v. C. & N. W. R. Co.* 196

17. A verdict in such action that the track was negligently constructed and unsafe, so that an ordinary rain storm would wash it out; that it was not properly inspected on the night in question; and that the injury was the result of the washout, without contributory negligence on the part of the plaintiff, is a sufficient finding as to proximate cause. *Ibid.*

18. Upon the question, submitted for special verdict, whether the culvert was negligently constructed and maintained by the defendant so as to render it inadequate for the purpose for which it was constructed, the burden of proof was upon the plaintiff. Sec. 1816, Stats. 1898 (providing for a recovery where a railroad employee is injured by a defect in any track, when such defect could have been discovered by reasonable and proper care, and that proof of such defect shall be presumptive evidence of knowledge thereof on the part of the company), did not relieve him from such burden, since the question related to original defects in the culvert before the washout, and until such defects were shown to exist the presumption of knowledge thereof did not arise. *Ibid.*

19. Upon the questions whether the washout could have been discovered by defendant's employees by the exercise of reasonable care in time to prevent the accident, and whether the track walker was negligent in not properly inspecting the track, the burden of proof was also upon the plaintiff, when it appeared that the washout had occurred within a few hours of the accident and that the company in fact had no notice of it. *Ibid.*

20. A railway company is not charged with an absolute duty to its employees to make its culverts safe, but only with reasonable and ordinary care and prudence to make them safe, considering their uses and purposes. *Ibid.*

21. In an action against a railroad company to recover for injuries sustained by an employee whose foot had been run over while he was attempting to seal the end door of a car attached to the tender, plaintiff's testimony that his foot was caught between the main rail and a guard rail and injured by the wheel of the tender is *held*

insufficient to sustain a finding by the jury to that effect, where such testimony showed that it was not based upon recollection, but was the result of inference, and the appearance of the shoe worn upon the injured foot and plaintiff's position after the accident were consistent only with the theory that his foot was caught between the main rail and the wheel. *Hibbard v. C., St. P., M. & O. R. Co.* 624

Killing of animals on track: Notice: Contributory negligence: Section man.

22. A notice to a railway company of a claim for the killing of cows through its negligence "in failing to keep the gate in the fence separating the right of way of said railway company from a portion of the farm of W., in said town of Blooming Grove, closed," and in the management of its train "upon and along said right of way," etc., reasonably construed, locates the place of the accident on the right of way through W.'s farm, and is not so indefinite with respect to the place of the accident as to prevent a recovery. *May v. C. & N. W. R. Co.* 673

23. Failure of a section man to close a gate which he knew to be open in the fence along that part of the right of way upon which he was employed does not relieve the railway company from liability for the killing of animals belonging to him, which strayed upon the right of way through said gate and were struck by a passing train, unless it be shown that it was his duty to close such gate. *Ibid.*

RAPE: Assault with intent. See CRIMINAL LAW, 8.

RATIFICATION. See AGENCY, 3. CONTRACTS, 4. HIGHWAYS, 4. PARTNERSHIP, 5.

REAL PROPERTY. See ADVERSE POSSESSION. EJECTMENT. EQUITY, 1, 2, 7–10. ESTATES OF DECEDENTS, 3–5. ESTOPPEL, 1, 2. EXECUTIONS. FINDINGS OF FACT. FRAUDULENT CONVEYANCES, 1. INSURANCE, 17. LIENS, 1. MORTGAGES. PLAT OF LANDS. PUBLIC LANDS. REGISTER OF DEEDS. TAX TITLES. TRUSTS. WILLS, 3.

REASONABLE DOUBT. See CRIMINAL LAW, 4–7.

REASONABLE TIME. See LIMITATION OF ACTIONS.

RECEIVERS.

1. Sec. 1694*b*, Stats. 1898, authorizing the appointment of a receiver for the nonexempt property of an insolvent debtor without a determination by a jury of the existence of the requisite facts, is not in violation of sec. 5, art. I, Const., providing that "the right of trial by jury shall remain inviolate," etc., since that language relates only to the right as it existed when the constitution was adopted. *Rider-Wallis Co. v. Fogo,* 536

2. Even if sec. 1694*b*, Stats. 1898, is invalid, under sec. 2, art. VII, Const., so far as it attempts to empower a circuit judge at chambers to appoint a receiver of the property of an insolvent debtor, yet it is valid so far as it vests such power in the court. *Ibid.*

3. Under sec. 1694*b*, Stats. 1898 (providing that upon petition by creditors of an insolvent debtor for the appointment of a receiver, the court shall proceed summarily "to hear the parties and receive such evidence as may be proper, and if it shall appear to the court" that the debtor is insolvent, etc., the court shall appoint a receiver), it is error to appoint a receiver without evidence, even though the debtor does not answer or appear in the proceeding. *Ibid.*

RECORDING ACTS. See ESTOPPEL, 2. EXECUTIONS. REGISTER OF DEEDS.

REFERENCE. See APPEAL, 5.

REFORMATION of written instruments. See EQUITY, 1, 2. INSURANCE, 10.

REFUND on invalid tax certificates. See TAX TITLES, 3–5.

REGENTS of state university. See ASSIGNMENT, 4. UNIVERSITY OF WISCONSIN.

REGISTER OF DEEDS.

See EXECUTIONS.

If a register of deeds, required by law to keep a tract index, neglect his duty as to a mortgage on a particular parcel of land, which parcel another subsequently purchases, not knowing of such mortgage by reason of relying on such index, on discovering the facts and failing by reasonable efforts to secure a release of the mortgage from the owner thereof, such other may purchase such mortgage, and, having exhausted his remedy to obtain reimbursement for his expenditures in that regard against his covenantee if there be such, and against the mortgagor as well, may hold the register of deeds and the sureties on his official bond for the residue of such expenditures and interest thereon. *Johnson v. Brice*, 575

RELEASE of surety. See BILLS AND NOTES, 3–5.

REMEDIES. See ACTION, 1, 2, 4, 5, 7, 9, 10. AGENCY, 3. CONSTITUTIONAL LAW. CONTRACTS, 1–4. CORPORATIONS, 4. DAMAGES, 4. EQUITY. ESTATES OF DECEDENTS, 5. FRAUDULENT CONVEYANCES. GARNISHMENT, 2. HIGHWAYS, 5. JUDGMENT, 7, 8. LIENS. LOGS AND TIMBER, 1. MUNICIPAL CORPORATIONS, 1–4. NUISANCES. OFFICERS. REGISTER OF DEEDS. SALE OF CHATTELS, 1, 2. SURETYSHIP. TELEPHONE COMPANIES, 3, 4.

REPAIRS on real property. See TRUSTS, 1, 2.

REPLEVIN.

In replevin by the vendor of goods their value was alleged, both in the complaint and answer, to be a certain sum. Plaintiff's agent who had identified the goods testified that said sum was the invoice price and that that was their value. *Held*, that the court, in directing a verdict, properly fixed their value at that amount, although the same witness further testified that the goods had depreciated in value forty per cent. during the twenty-two days which had elapsed since their sale, because they had been unpacked and placed on shelves and some suits and sizes sold. *Jenkins v. Steanka*, 19 Wis. 126, distinguished. *David Adler & Sons C. Co. v. Thorp*, 70

RES ADJUDICATA. See JUDGMENT, 6.

RESCISSION. See CONTRACTS, 1–4. EQUITY, 3, 4, 8. SALE OF CHATTELS 1, 6–8.

REVERSAL. See APPEAL, *Affirmance and reversal.*

ROADS AND STREETS. See COUNTIES. HIGHWAYS. MUNICIPAL CORPORATIONS, 4–9. PLAT OF LANDS. TELEPHONE COMPANIES.

RULES OF COURT.
Supreme Court Rule IV (Return to writ of *certiorari*), 234.
Supreme Court Rules VIII, IX (Case and briefs), 198, 211.
Supreme Court Rule XXXII (Reversal of excessive judgment), 351.

SALE OF CHATTELS.

See APPEAL, 2. CONTRACTS, 1, 2, 4, 5, 8–10. CORPORATIONS, 2, 4. LOGS AND TIMBER, 1, 2. PARTNERSHIP, 5.

1. A vendor of merchandise cannot rescind the sale and reclaim the goods merely because the purchasers, knowing themselves to be insolvent, did not disclose that fact, where no inquiries and no false statements were made and no artifice resorted to to mislead the vendor, and it does not appear that the goods were bought with the fraudulent intent of not paying for them. *David Adler & Sons C. Co. v. Thorp,* 70

2. One buying an article upon an express warranty may sue for any damages resulting from a breach without returning or offering to return such article. *Nauman v. Ullman,* 92

3. Plaintiff bought a horse from the defendant upon an express warranty that it was well and sound except for a cold, and, paying part of the price, gave a three-days note for the balance, which provided that the ownership and possession should not pass from the vendor until the note was paid. Plaintiff received the horse, and paid the note when due, but without knowledge that the disease of the horse was other than a cold, and after its death brought suit upon the express warranty. *Held,* that there had been no waiver of the warranty. *Ibid.*

4. The signing of such note was not a reduction of the contract to writing, which would render parol evidence of the warranty inadmissible, since the note did not in terms purport to state the whole contract but was merely a document in execution of a part thereof. *Ibid.*

5. A question for a special verdict, "Did the defendant sell and the plaintiff buy said horse for a sick horse, the plaintiff taking his chance?" was not objectionable as being compound, it being conceded that plaintiff purchased the horse knowing it was sick but supposing it to be sick only with a cold, and the material part of the question being merely whether or not he agreed to assume the risk of such sickness as the horse might have. *Ibid.*

6. By a contract indicating a present sale of lumber by plaintiff to defendants, the latter agreed to give their note for a part of the price and to pay the balance after plaintiff had carried the lumber for them to Chicago. Learning, however, that the title was still in plaintiff's vendor of the timber from which the lumber had been sawed, who had not been fully paid, defendants refused to give the note when demanded unless plaintiff would clear the title or give a bond for delivery of the lumber free from liens. Plaintiff refused to do either, and soon after removed defendants' mark from the lumber and sold it to other persons. *Held,* that the contract had been rescinded. *Shores Lumber Co. v. Claney,* 235

7. It was immaterial, in such case, that plaintiff's vendor permitted it to sell lumber before making payment, if no such claim was made when defendants refused to give the note and no information to that effect was ever given them. *Ibid.*

8. Where, in such case, the carriage of other lumber belonging to defendants to market was made a condition precedent to the taking effect of the sale, the performance of that condition by plaintiff, for which it was fully paid, did not preclude the defendants from rescinding the sale for failure of title. *Ibid.*

9. The nonperformance of an agreement to transport lumber to market on the first trip made in the spring is not excused by the fact that there was ice near the dock which prevented getting at it handily. *Ibid.*

10. Under a contract by which defendant was to pay a certain price for timber to be "furnished" by plaintiff, the latter is not entitled to recover the full contract price for timber which, after she had cut it, was found to belong to the United States, and for which defendant was compelled to pay the government, but defendant should be credited with the amount paid to the government. *Parish v. McPhee,* 241

11. At the time of making such contract defendant was negotiating for the purchase of certain lands, and instructed plaintiff to cut the timber therefrom, and afterwards purchased and became the owner of such timber. *Held,* that this timber was not "furnished" by plaintiff under the contract, and that she could recover the contract price therefor only after crediting defendant with the value of the stumpage. *Ibid.*

SALE OF LAND. See EQUITY, 1, 2, 7–10. ESTATES OF DECEDENTS, 3–5. ESTOPPEL, 1, 2. EXECUTIONS. FINDINGS OF FACT. REGISTER OF DEEDS. TAX TITLES.

SANITY. See CRIMINAL LAW, 2, 3. EVIDENCE, 8. JUDGMENT, 3–5.

SATISFACTION of claim for injury resulting in death. See ACTION, 5.

SCHOOLS. See COMMON SCHOOLS.

SERVICE of notice. See EVIDENCE, 11. HIGHWAYS, 8.

SETTLEMENT: Rescission for fraud. See CONTRACTS, 3.

SHERIFF: Conclusiveness of return on execution. See VOLUNTARY ASSIGNMENT, 3.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 5–9.

SPECIAL VERDICT. See AGENCY, 1, 2. APPEAL, 18, 19. INSTRUCTIONS TO JURY, 2–6. MASTER AND SERVANT, 13. RAILROADS, 17. SALE OF CHATTELS, 5. VERDICT.

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SURETYSHIP.

See BILLS AND NOTES, 3-5.

A surety upon an appeal bond conditioned for the payment of any judgment finally recovered against his principal is not entitled, in the absence of fraud or collusion, to have a judgment against his principal vacated and to have permission to defend, where his principal would have no such right. *Ingersoll v. Seatoft*, 476

SURVIVAL of actions. See ACTION, 1-7.

TAXATION of costs. See APPEAL, 23. GARNISHMENT, 4.

TAX TITLES.

See ESTOPPEL.

1. The provision of sec. 1191, R. S. 1878, that the county shall be the exclusive purchaser at a tax sale of lands upon which it already holds a tax certificate does not prevent the statute of limitations running

in favor of a tax deed based on a tax sale of such lands to a different purchaser, where the lands were not exempt from the taxes for which such sale was made. *Gilbert v. Pier,* 334

2. Under the provision of sec. 1191, R. S. 1878, that lands shall be exempt from taxation when a tax deed shall be issued to a county and it shall hold the certificates of tax sales for two successive years subsequent to the sale on which such deed shall issue, there is no presumption that the county to which a deed is issued holds the certificates of such other sales, although the section provides that the county shall be the exclusive purchaser at such sales, since the former owner may have paid the taxes for those years; but where the lands are subsequently taxed and sold for taxes to another person the presumption is, rather, that the lands were then subject to taxation. *Ibid.*

3. Rightful claims for refund upon invalid tax certificates under sec. 1184, R. S. 1878, upon which suit had been brought prior to the enactment of ch. 215, Laws of 1897, were not defeated by the latter act, although the invalidity was by reason of irregularities not affecting the groundwork of the taxes. *Pier v. Oneida Co.* 338

4. The fact that lands covered by invalid tax certificates had, prior to the application for a refund, passed out of the limits and jurisdiction of the county which issued such certificates, does not release such county from the obligation to make the refund. *Ibid.*

5. The holder of invalid tax certificates held, also, tax deeds on the same lands based on prior sales. Such deeds were invalid and were surrendered for cancellation. All the claims for refund on such certificates and deeds were brought to the circuit court at the same time by appeal from the county board, but, by the consolidation of various different claims pursuant to stipulation of the parties and order of the court, the claim upon the certificates in question became separated from the claim on the deeds on the same land. *Held,* that such severance should not, under the circumstances, defeat a recovery upon the certificates. *Ibid.*

TEACHERS: Contract of employment. See COMMON SCHOOLS.

TELEPHONE COMPANIES.

1. The right given to telegraph and telephone companies by sec. 1778, Stats. 1898, to construct and maintain their lines upon or along highways, is subject to all reasonable regulations made by the respective municipalities. *Marshfield v. Wis. Telephone Co.* 604

2. A municipality may, in the exercise of a reasonable discretion, prohibit the setting of telephone poles in certain of its streets. *Ibid.*

3. Where a city charter gives the common council authority to regulate by ordinance the placing of telephone poles, etc., in its streets, and provides that no obstruction shall be placed in the streets without a written permit from the board of public works, and that said board shall have power to determine the time and manner of using streets for the placing of such poles, subject to an appeal to the council, sec. 1778, Stats. 1898, confers no right upon a telephone company to occupy the streets of said city without the permission of the proper authorities, even though no regulation as to such use has been adopted; but application for such permission should be made to the board of public works and a reasonable time given for that body to act, and if its action proves unsatisfactory an appeal should be taken to the council. *Ibid.*

4. In the absence of a proper and timely application to the board of public works in such a case, the court has no right to interfere to compel it to act. *Ibid.*

TERMS OF COURT.

1. The term of office of a circuit judge expired on Monday, January 3d. On the preceding Thursday, December 30th, he instructed the clerk to hold open the current term of court during the ensuing two days and until the expiration of his said term of office, and that then the business of the term would be concluded and the term would stand adjourned. *Held*, that this was not a direction to the clerk to enter a final adjournment. *State ex rel. Barber v. McBain*, 431

2. Final adjournment of a term of court is a judicial act, requiring the presence of the court, and power to perform it cannot be delegated to the clerk. *Ibid.*

3. Where the court has merely directed that a term be held open, without adjournment to any specific day, and the judge thereafter fails to attend, the clerk has no power, under sec. 2573, Stats. 1898, to enter a final adjournment. The power given by that section is to be exercised only within the exact conditions there prescribed, that is, when the judge fails to attend at the time fixed by law for holding the term, and for three days thereafter, or when he so fails to attend on a day during the term which has been fixed by an adjournment thereto. *Ibid.*

4. Under sec. 2572, Stats. 1898, a term of court does not come to an end by failure to adjourn to a specific time, but once commenced it continues until terminated by an affirmative judicial act or by the commencement of a new term. *Ibid.*

TITLE TO LAND. See ADVERSE POSSESSION. EJECTMENT. EQUITY, 1, 2, 7–10. ESTATES OF DECEDENTS, 3–5. ESTOPPEL, 1, 2. EXECUTIONS. FINDINGS OF FACT. FRAUDULENT CONVEYANCES, 1. INSURANCE, 17. MORTGAGES, 2. PUBLIC LANDS. REGISTER OF DEEDS. TAX TITLES.

TOWNS. See HIGHWAYS, 6–8. MUNICIPAL CORPORATIONS, 5–9. PLAT OF LANDS.

TRANSACTIONS with person since deceased. See EVIDENCE, 3, 4, 7. WILLS, 1, 2.

TRESPASS. See RAILROADS, 14, 15.

TRIAL BY JURY. See RECEIVERS, 1.

TRUSTS AND TRUSTEES.

See ADVERSE POSSESSION, 2. CONTRACTS, 2. EQUITY, 2. FRAUDULENT CONVEYANCES, 1. PARTNERSHIP, 6.

1. If property consisting of real estate be by will conveyed to trustees to hold for the life of certain persons in being therein named, the income therefrom to be used so far as necessary to keep the property in repair and to pay the taxes and insurance, and the balance to be paid to those having the life interest during the continuation of their lives, and the corpus of the property to be, at the termination of the life interest, conveyed to a municipal corporation for purposes for which it may legally hold and devote it, and there be ample income from such property to preserve it for the ultimate purpose named in the will, and there be no express power in the

will for the trustees to make permanent repairs or improvements on the property out of the corpus thereof, only the income can be devoted to that purpose. *Mulberger v. Beurhaus*, 1

2. In the circumstances mentioned in the foregoing, the trustees of the trust, even with the consent of those having the life interest and the municipality entitled to the property ultimately, have no right to devote any part of the principal of the trust estate to the making of betterments or permanent improvements. *Ibid.*

3. In an action to enforce a trust, or concerning its administration, the subject of costs is regulated wholly by statute. All costs and counsel fees as well, for which the trustees would otherwise be liable, are chargeable to the trust property or income thereof, in the absence of some direction to the contrary based on bad faith on the part of the trustees. The court has no authority, independent of a statute on the subject, to direct the payment of costs or counsel fees out of the trust fund, except such taxable costs as the trustees would otherwise be compelled to pay personally. *Ibid.*

ULTRA VIRES. See COUNTIES.

UNCERTAINTY.
In special verdict. See AGENCY, 1, 2.
In notice of killing of animals. See RAILROADS, 22.

UNDERTAKING on appeal. See APPEAL, 3.

UNDUE INFLUENCE. See FRAUD, 4. WILLS, 3.

UNIVERSITY OF WISCONSIN.

1. The chairman of a special committee of the board of regents of the state university charged with the general direction of certain work has no authority, unless the same has been given him by the board, to modify the written contract which the board has authorized in respect to such work. *Skobis v. Ferge*, 122

2. A conversation between a contractor and the chairman of a special committee of the board of regents which has general direction of the performance of the contract is not binding on the board to vary the terms of the written contract thereafter formally executed. *Ibid.*

3. No verbal explanations or assurances by individual members of the board of regents could bind the board to an agreement either to pay or to guarantee the amount of a subcontract, nor subject the public moneys under its control to liability in excess of that authorized by the board. *Ibid.*

USAGE. See CONTRACTS, 6. LOGS AND TIMBER, 8.

VALUE: Evidence. See REPLEVIN.

VARIANCE. See PLEADING, 1.

VENDOR AND PURCHASER OF LAND. See ADVERSE POSSESSION. EJECTMENT. EQUITY, 1, 2, 7–10. ESTATES OF DECEDENTS, 3–5. FINDINGS OF FACT.

VERDICT.

See AGENCY, 1, 2. APPEAL, 18, 19. COURT AND JURY. INSTRUCTIONS TO JURY, 2–6. JUDGMENT, 1. MASTER AND SERVANT, 13. PRACTICE, 2. RAILROADS, 17. SALE OF CHATTELS, 5.

1. A finding in a special verdict that the agent of the vendor of a binder agreed that if on trial it did not suit the vendee he might

return it without notice, is not inconsistent with a finding that the agent did not mislead the vendee as to the contents of a written order signed by the latter, by the terms of which written notice and an opportunity to remedy defects were to be given before the binder could be returned. *Plano Mfg. Co. v. Bergmann,* 21

2. A refusal to submit questions for a special verdict as requested is not error where those submitted cover all the material issues. *Crouse v. C. & N. W. R. Co.* 196

3. Where the questions submitted to the jury for a special verdict cover all the material, controverted issues of fact, the ruling of the court in refusing to submit more specific questions will not be reversed save for an abuse of discretion. *Ward v. C., M. & St. P. R. Co.* 215

4. The object of a special verdict is to obtain from the jury answers to certain questions of fact, without regard to their legal effect upon the rights of the parties, and thus to obtain a result as far as possible free from sympathy and prejudice. The requiring of a general verdict also, and giving full instructions applicable to a general verdict, tends to defeat such object, and, if objections are duly made, is a material error. *Ibid.*

5. Same point. *Schaidler v. C. & N. W. R. Co.* 564

6. Questions submitted for a special verdict should be such that the jury will determine the substantial issuable facts and not the conclusions to be derived therefrom; and the refusal to submit such questions when requested is error, if in lieu thereof the court submits only a question calling for a conclusion, the answer to which leaves the party unadvised as to the real facts upon which the jury's conclusion is based. So *held* in an action for personal injuries where an employer's neglect of several distinct duties to his employee was in issue and the court submitted only the general question, Was the injury proximately caused by defendant's negligence? *Bigelow v. Danielson,* 470

VESTED RIGHTS. See CONSTITUTIONAL LAW. TAX TITLES, 3.

VILLAGE PLATS. See PLAT OF LANDS.

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT, 1. RECEIVERS.

1. In an action of replevin against an assignee, to which the assignor is not a party, the latter is a competent witness, and it is not error to exclude his examination, taken under sec. 1702*b*, S. & B. Ann. Stats. (sec. 1693*b*, Stats. 1898), when offered, not by way of impeachment, but as substantive evidence. *David Adler & Sons C. Co. v. Thorp,* 70

2. Although sec. 1695, R. S. 1878, provides that the assignee's bond, together with a copy of the assignment, shall be filed by the officer taking the same in the office of clerk of the circuit court, the manual filing of the paper by a messenger, instead of by the officer himself, will not avoid the assignment, if the papers are in all other respects properly executed and are filed in proper time. *Toepfer v. Lampert,* 465

3. The rule that a sheriff's return upon execution as to his official acts done thereunder is conclusive upon the parties to the action and their privies does not preclude an assignee for the benefit of the

creditors of an execution debtor from showing, in contradiction of the return, that the levy was not in fact made until after the filing of the assignment, because if the assignee's title accrued before the levy he is not a privy and not bound by the return. *Ibid.*

4. A conveyance or other arrangement by which an insolvent debtor places part or all of his property under the control of another, whether a creditor or not, in trust for the benefit of one or more of his creditors, with or without preferences, constitutes an assignment for the benefit of creditors and is voidable at the election of any creditor not consenting thereto, unless the statutory requisites for the making of voluntary assignments be complied with. *Sweet, Dempster & Co. v. Neff,* 482

5. Where separate mortgages of the property of an insolvent debtor were given at the same time to several creditors, with an agreement or understanding, evidenced by the writings and by the conduct of the parties, that the first mortgagee should take immediate possession for the benefit of all, convert the property into money, and account therefor to the other mortgagees or their mutual agent, the transaction is *held* to have constituted a voluntary assignment. *Menzesheimer v. Kennedy,* 75 Wis. 411, and *Michelstetter v. Weiner,* 82 Wis. 298, distinguished. *Ibid.*

VOLUNTARY CONVEYANCE. See FRAUDULENT CONVEYANCES, 1.

WAGERS. See GARNISHMENT, 1.

WAIVER.
Of tort. See ACTION, 10. DAMAGES, 4. PLEADING, 2, 3.
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WARRANTY. See CONTRACTS, 8–10. SALE OF CHATTELS, 2–5.

WILLS.

See DOMICILE, 1. JUDGMENT, 6.

1. An heir of a testator, for whom no provision is made in the will, is a competent subscribing witness thereto. *In re Will of Hoppe,* 54

2. An heir of a testator, if not provided for in the will, is a party adverse to the proponents in the probate proceedings, and is not incompetent under sec. 4069, R. S. 1878, to testify on behalf of such proponents to transactions by him personally with the deceased. *Ibid.*

3. The evidence in this case (fully stated in the opinion) is *held* to show that an alleged will was procured by undue influence or fraud. *Baker v. Baker,* 226

4. Claimed in a will contest that two of three subscribing witnesses signed the attestation clause in the absence of the testator at the residence of one of such two, such one being a lawyer of large experience and the personal friend and confidential adviser of the testator. Such lawyer witness was dead at the time of the trial, and the other two supported the claim of the contestants. The finding on that and other evidence was that only one witness signed in the presence of the testator. *Held,* on appeal, that the presumption as to the truth of the attestation clause, arising from the professional character of the deceased witness and his relations

to the decedent, was not sufficient to warrant holding that the decision of the trial court was against the clear preponderance of the evidence. WINSLOW, J., dissents. *Adams v. Rodman*, 456

5. In a proceeding to probate the will of a testator who, at the time of his death, was a resident of and domiciled in Wisconsin, it is immaterial whether his children to whom the estate is left are legitimate or illegitimate. *Frame v. Thormann*, 653

6. So far as the judgment of the Wisconsin court, in such a case, attempted to legitimatize adult children of the testator residing in another state, it was extra-judicial and inoperative. *Ibid.*

WITNESSES. See EVIDENCE, 3, 4, 6–8. VOLUNTARY ASSIGNMENT, 1. WILLS, 1, 2, 4.

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